Approved: 2-26-02
Date

MINUTES OF THE SENATE UTILITIES COMMITTEE.

The meeting was called to order by Chairperson Senator Stan Clark at 9:30 a.m. on February 20, 2002 in Room 231-N of the Capitol.

All members were present except: Senator Wagle (excused)

Committee staff present: Raney Gilliland, Legislative Research
Emalene Correll, Legislative Research
Bruce Kinzie, Revisor of Statutes
Ann McMorris, Secretary

Conferees appearing before the committee:
Dick Brewster, BP America, Inc., Oklahoma City
Jerry Heredan, The Williams Company
Dave Cruz, BP America Inc., Southwest Kansas
Jim Tyler, Westar Energy
Bob Krehbiel, KIOGA
David Pierce, Professor of Law, Washburn University
Rex Brown, Sublette
Chris Hammer, Sublette
Peter York, Sublette
Wilferd Nichols, Copeland
Bill Lower, Kansas Legislative Policy Group
Larry Berg, Midwest Energy, Inc.

Others attending: See attached list

The chairman continued the hearing on:
SB 490 - Kansas underground utility damage prevention act, regulations

Proponents:

Dick Brewster, BP America, spoke in support of **SB 490** and stated their position on the amendments offered by KCC, Kansas Gas Service, & Southwestern Bell in testimony presented at the hearing on February 14, 2002. (Attachment 1)

Dave Cruz, field foreman, BP America, explained the importance to excavators to have all types of underground lines locatable. (Attachment 2)

Jerry Heredan, The Williams Company spoke in support of **SB 490.**

Jim Tyler, Westar Energy, spoke in support of **SB 490** and the proposed amendments. (Attachment 3)

Bob Krehbiel, Kansas Independent Oil & Gas Association, presented proposed amendments by KIOGA to **SB 490.** (Attachment 4)

Opponent
Written testimony provided by Craig S. Laird, Southwestern Bell Telephone Company. (Attachment 5)

Comments of the Kansas Corporation Commission staff on amendments offered to **SB 490** on February 20, 2002, were distributed to the committee. (Attachment 6)

The Kansas Trial Lawyers Association presented a written review of the amendments to **SB 490** offered by the other conferees at the February 14, 2002 hearing. (Attachment 7)

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

MINUTES OF THE SENATE UTILITIES COMMITTEE at on February 20, 2002 in Room 231-N of the Capitol.

Chairman closed the hearing on **SB 490.**

The chairman opened the hearing on

SB 547 - Rural Kansas self-help gas act.

Proponents:

David Pierce, Professor of Law, Washburn University (Attachment 8)
Rex Brown, Sublette (Attachment 9)
Chris Hammer, Sublette (Attachment 10)
Peter York, Sublette (Attachment 11)
Wilferd Nichols, Copeland (Attachment 12)
Bill Lower, Kansas Legislative Pollicy Group (Attachment 13)

Written testimony only from:
Roger Kelman, Sublette (Attachment 14)
Chris Wilson, SW Kansas Groundwater Management District #3 (Attachment 15)
Erick Nordling, SW Kansas Royalty Owners Association (Attachment 16)
Leslie Kaufman, Kansas Farm Bureau (Attachment 17)
Jere White, Kansas Corngrowers Assn. (Attachment 18)

Opponents
Larry Berg, Midwest Energy, Inc. (Attachment 19)

Due to lack of time, the chair announced hearings on **SB 547** would be continued on Friday, February 22, 2002.

Minutes for Senate Utilities meetings held on February 6, 2002, February 11, 2002, February 12, 2002, February 13, 2002 and February 14, 2002 were distributed to the committee.

A news item from the February 16, 2002 Capital-Journal entitled "Nuclear Waste: Bush Oks Yucca Mountain Storage" was distributed to the committee. (Attachment 20)

The next meeting of the Senate Utilities Committee will be on February 21, 2002

Adjournment.

Respectfully submitted,

Ann McMorris
Secretary

Attachments - 20

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

SENATE UTILITIES COMMITTEE GUEST LIST

DATE: **FEBRUARY 20, 2002**

Name	Representing
Clayton Nuzeman	KLA
Emily Clawson	SWKIA
John D. Smith	SWKIA
Dillon Hupp	Federico Consulting
Nick Heiman	
Craig Caine	SBC
John Finegan	Kansas Legislative Policy Group
Bob Lawson	Council Kansas
Jim Ross	SBC
[illegible]	Kansas Gas Service
[illegible]	KCC
Susan Cunningham	KCC
Tom Day	KCC
Tom Bruno	Williams
David McDermott	Qwest Com
Jim Tyler	Western Energy

SENATE UTILITIES COMMITTEE GUEST LIST

DATE: **FEBRUARY 20, 2002**

Name	Representing
- Bill Lower	Haskell Co. + KLPG
Chris Hammer	H&H Farms
~~Nick York~~	York Farms
Peter York	York Farms
Rex Brown	Brown Enterprises
David Pierce	SW Ks. Irrigation Assoc.
Larry Kepley	sw Irr Assoc - Farmer
Charles M. Odgers	3M Farms Inc.
Keith Williamson	Williamson Farms
Michael White	White Farms
RANDALL BIRD	Triple R Farms
Wilferd Nichols	KS Corn Growers
Andy Shaw	SWKIA
Mike K. Hurt	Kearney Law
~~Tim Fe~~	AES
JEFF KRUSKE	KS Livestock Assn

SENATE UTILITIES COMMITTEE GUEST LIST

DATE: **FEBRUARY 20 2002**

Name	Representing
Tom Shimon	Kansas One Call
Leo Haynos	Kansas Corporation Commission
Gary Dawdy	Ks. Corp. Comm.
Steve Johnson	Kansas Gas Service
Ron Appletoft	WATER DIST. No 1 of JoCo
Justin Hamlin	Southwest Kansas Irrigation Association
Bob Anderson	Atmos Energy Corp.
Jim Baetling	Greeley Gas / Atmos Energy Corp
James G. Flaherty	Util. Corp United, Inc.
Dave Cruz	bp America
Dick Brewster	bp America
Whitey Gamm	KS Gas Service

Comments to:

The Kansas Senate Committee on Utilities

In Support of:

Senate Bill N0 490

Submitted By:

Dick Brewster
Director, Government Affairs
BP America

Senate Utilities Committee
February 20, 2002
Attachment 1-1

Mr. Chairman, Members of the Committee, for the record, my name is Dick Brewster, and I am Director of Government Affairs for BP.

I appreciate the chance to offer you our thoughts on S. B. 490. We strongly support passage of this legislation. We believe it is an important step in providing for the safety of human life, and the protection of property and the environment.

I know you have already had a hearing on this bill, and I'll try not to repeat what you have already been told. I do appreciate the Chairman continuing the hearing to today, so that the views of BP and Williams may be heard.

Several of the conferees last week suggested amendments. We would support the amendments proposed by Leo Haynos, the Chief of Pipeline safety for the KCC. His proposal would simply give the KCC needed rulemaking authority, and remove a reference to an association that is no longer active in this area.

Amendments offered by Kansas Gas Service would give exclusive original jurisdiction to the KCC if an operator failed to comply and mark the lines within the two working days provided, and limit the time or the filing of any such complaint with the KCC. We certainly have no objection to these amendments, and would support them, but feel the bill should not be jeopardized if they raise controversy.

The amendments suggested by Southwestern Bell, frankly, will bring back into the debate much of the controversy which effectively killed last year's bill in the House. We do not oppose those amendments, but believe this controversy should not be re-introduced into this year's debate.

The comments of the Kansas Trial Lawyers Association express disagreement with a portion of the bill which does not change existing statute. Thus, their objections apparently are directed at the law as it has been on the books for a year or more. We would not support that group's proposed amendments.

I have heard some objection to Section 4 (e) of the bill, appearing on page 4, lines 38 and 39. This provision requires that all facilities installed by an operator after January 1, 2003 shall be locatable. Please note that an "operator" is defined as the owner or operator of an underground facility. A

"facility" is defined, and contains several exclusions. Thus, I presume, the January 1, 2003 requirement does not apply to operators who operate facilities excluded from the definition of "facility." So, if one hears objections to the 2003 requirement from operators whose facilities are excluded from the definition of facility, one must wonder why the objection.

But, I have to say this: It is completely beyond me why anyone would want to bury a line which might contain flammable or explosive substances and not make it locatable. As inexpensive and easy as it is to make such a line locatable, I cannot understand why anyone would want to put human life and safety at risk. Mr. Chairman, members of the committee, I simply do not understand this kind of thinking.

Having said that, let me conclude by pointing to what we believe to be the most important provision in S.B. 490. It is the so-called "white lining" requirement. This provision will allow an operator to improve the precision of marking the location of any underground facilities.

Our operations in Southwest Kansas cover vast unplatted areas, though some of our operations are within platted areas. With the white lining provision, the excavator can tell us where he or she wants to dig, and we can more easily protect him or her from injury. Checking our facilities along a planned excavation line will work much better than trying to check a quarter section.

Senate Bill 490 will help us inform excavators of the location of our lines and help protect them and their workers from injury and death. Of course, we do not like to incur the expense and down time that results when our lines are hit. But more than that, we do not want anyone to suffer injury or be killed because there was not an adequate opportunity to locate and mark our underground facilities.

We urge you to approve S.B. 490 and commend it to the full Senate for passage. I appreciate the chance to appear before the Committee. I'll be glad to answer any questions.

Dave Cruz is our Field Foreman in Ulysses, Kansas. Dave has first hand experience with some of the problems and concerns addressed by S.B. 490. He also serves on the Kansas One Call Board. Let me ask Dave to offer his comments the Committee.

Mr. Chairman, members of the committee, my name is Dave Cruz. I work for BP America. I would like to speak to you about lines that run through fields in Southwestern Kansas.

Lines that are defined as petroleum lead lines under SB 490. These lines transport flammable liquids and gas from the wellhead to production facilities. They can be hit by excavators and cause as much damage as any other underground facilities but because of the definition do not have to be marked.

I have several friends that operate equipment in my part of the state, not only on excavation done for us but also for agricultural purposes such as electric lines for center pivots and water lines that go from the irrigation wells out to the center of the fields to the pivots. If these lines were at the very least locatable by the contract crews it may prevent an injury, death or at least damage to the line. As I said I have several friends that work on excavation equipment and I do not want to have to go to a hospital to visit or worse never be able to visit them again.

We at BP have seen a problem in not getting lines marked or not even having them locatable so we have developed a Ground Disturbance Policy, which tries to take into consideration all the hazards that we may come up against in the marking or should I say the nonmarking of underground facilities.

The policy includes: driving around the section to look for line markers, hand digging around unmarked lines, walking the proposed route with a line locating instrument, calling farmers in the area to ask about lines they may know about that are not marked, of course doing a One Call and looking for any ground disturbance or difference in the grass or crop that may be growing. A crop at times will grow taller in an old ditch line.

Westar Energy™

Testimony before the
Senate Utilities Committee
By
Jim Tyler, Senior Manager, Design and Support Services
Westar Energy
February 20, 2002

Chairman Clark and members of the committee, I am Jim Tyler, senior manager, design and support services for Westar Energy. I have been actively involved in underground damage prevention since 1998, and I serve as chairman of the Operating Committee for Kansas One Call.

Westar Energy supports Senate Bill 490 and the amendments proposed by Kansas Gas Service. These amendments offer needed guidelines regarding liability and jurisdiction.

The Kansas Corporation Commission is the best choice to assess if a conflict between a utility and excavator requires court action for resolution. This will prevent unfounded claims from clogging the already overloaded court system.

Senate Bill 490 is a good example of balancing the interests of various parties, and the amendments proposed by KGS maintain that balance. Westar Energy urges you to approve this measure and those amendments.

818 South Kansas Avenue / P.O. Box 889 / Topeka, Kansas 66601
Office Telephone: (785) 575-6300

STATE OF KANSAS
SENATE
COMMITTEE ON UTILITIES

HEARING ON SB 490
FEBRUARY 20, 2002

TESTIMONY OF
ROBERT E. KREHBIEL, EXEC. V.P.
KANSAS INDEPENDENT OIL & GAS ASSOCIATION

Senate Utilities Committee
February 20, 2002
Attachment 4-1

TESTIMONY

Chairman Clark and members of the Committee, my name is Robert E. Krehbiel appearing on behalf of the Kansas Independent Oil & Gas Association. Our Association consists of over seven hundred fifty independent oil and gas producers who explore for, drill and produce oil and natural gas in Kansas.

We appreciate the opportunity to join those who have preceded us in presenting numerous amendments to this bill. We have attached a series of amendments which we believe will make this a better bill. Should the Committee decide to work this Bill we would ask the Committee include these amendments.

Thank you very much for the opportunity to appear.

AMENDMENTS TO SB 490
PROPOSED BY THE KANSAS INDEPENDENT OIL AND GAS ASSOCIATION

1. At the appropriate place in the definitional section, include a new definition of the term "platted land" as follows:

> "Platted Land" means a tract or parcel of land which has been subdivided into lots of less than 5 acres for the purpose of building developments, including housing developments, and for which a surveyor's plat has been filed of record in the office of the register of deeds in the county where the land is located.

2. At the appropriate place in the definitional section, include a new definition of the term "production petroleum lead line" as follows:

> "Production Petroleum Lead Line" means underground facilities used for production, gathering or processing on the lease or unit, and preparation for delivery of hydrocarbon gas and/or liquids. Such facilities include underground lines associated with lease fuel, saltwater disposal and injection.

3. On Page 3, line 25, place a period following the word "excavation" and delete the remainder of the sentence including the rest of line 25, all of line 26 and line 27.

4. On Page 3, line 28, following the word "shall" and preceding the word "whiteline", insert the following additional words:

> "at the request of the operator"

5. On Page 3, line 31, following the word "precise" delete the words "tract or parcel involved" and replace With the words "location of the proposed excavation".

6. On Page 4, line 14, following the word "excavate", and preceding the word "an" insert the following additional words:

> "and has whitelined the excavation site if requested by the operator pursuant to Section 2(e)"

COMMENT

On Page 5, beginning at line 18, the State Corporation Commission is given authority to develop rules and regulations establishing minimum operating guidelines for trenchless excavating techniques. Again on Page 6, beginning at line 13, the State Corporation Commission is authorized to establish rules and regulations relating to remedies in support of this Act.

This appears to be the first time the State Corporation Commission has been given authority to establish rules and regulations pursuant to this Act. We presume from this language that this authority is limited to these specific purposes. If it is the intention of the Legislature to move one-call from a private entity to a state agency it may be useful to clarify this issue.

...r passenger vehicles used to ...r hire, used in the operation ...such, except those used in op... ...nder the provisions of K.S.A. ...dments thereto. For the pur... ...paying the cost of supervision ...notor carriers, every such car... ...ay to the commission for each ...gulatory fee of $10 for each ...r or passenger vehicle regis... ...ommission. No fee shall be ...r or semitrailer.

...tions for registration shall be ...nished by the commission. Ap... ...tration of interstate common or ...rriers shall include on the ap... ...ntity of trucks, truck tractors or ...s used by the motor carriers on ...quired to be paid. Applications ...intrastate common or contract ...ivate motor carriers, and inter... ...or carriers shall include the com... ...ntification numbers and the year ...ucks, truck tractors or passenger the motor carrier, on which a fee paid, and the application shall be the required fee. The fees shall ...l and shall be paid not later than ...n receipt of the application and ...sion shall issue to the carrier ap... ...ntials for each vehicle registered. ...mission shall remit all moneys re... ...or it in payment of fees imposed ...tion to the state treasurer daily. ...f each such remittance, the state deposit the entire amount thereof ...sury and the same shall be credited ...rrier license fees fund.

... 1955, ch. 297, § 2; L. 1956, ch. ...7, ch. 350, § 2; L. 1968, ch. 159, § ...288, § 2; L. 1982, ch. 277, § 1; L. ... § 3; L. 1989, ch. 207, § 1; L. 1992, ...1993, ch. 263, § 8; July 1.

...a. Base state registration ...d. All amounts collected under ...9, and amendments thereto, for the ...gistration of motor vehicles, pursu... ...C. 11506, shall be remitted by the ...tion commission to the state trea... ...he state treasurer shall deposit the ...t in the state treasury and credit such ...e base state registration clearing fund which is hereby created. Payments due and owing to participating states pursuant to 49 U.S.C. 11506 and refunds for overpayment shall be made from such fund. The state corporation commission shall reconcile such clearing fund monthly with balances remitted monthly.

History: L. 1993, ch. 263, § 1; July 1.

REGULATION OF RADIO COMMON CARRIERS

66-1,143.

CASE ANNOTATIONS

2. Mentioned in holding that one-way radio paging service company not a public utility for property taxation purposes. First Page, Inc. v. Cunningham, 252 K. 593, 599, 847 P.2d 1238 (1993).

3. Radio common carrier not considered a public utility for property tax purposes. In re Appeal of Topeka SMSA Ltd. Partnership, 260 K. 154, 160, 917 P.2d 827 (1996).

4. KCC was not prohibited by subsection (b) from requiring wireless service providers to contribute to KUSF. Citizens' Utility Ratepayer Bd. v. Kansas Corporation Comm'n, 264 K. 363, 366, 371, 386, 956 P.2d 685 (1998); aff'g 24 K.A.2d 222, 234, 943 P.2d 494 (1997).

66-1,145.

CASE ANNOTATIONS

2. Radio common carrier not considered a public utility for property tax purposes. In re Appeal of Topeka SMSA Ltd. Partnership, 260 K. 154, 160, 917 P.2d 827 (1996).

3. KCC was not prohibited by 66-1,143(b) from requiring wireless service providers to contribute to KUSF. Citizens' Utility Ratepayer Bd. v. Kansas Corporation Comm'n, 264 K. 363, 387, 391, 956 P.2d 685 (1998).

LOCAL CARTAGE CARRIERS

66-1,146 to 66-1,149.

History: L. 1970, ch. 270, §§ 2 to 5; Repealed, L. 1995, ch. 98, § 22; Apr. 13.

GAS PIPELINE SAFETY

66-1,151. Violation of standards; penalty. Any person who violates any rule or regulation adopted pursuant to this act, or any rule and regulation adopted by the commission and in effect on July 1, 1969, shall be subject to a civil penalty not to exceed $25,000 for each violation for each day that the violation persists. However, the maximum civil penalty shall not exceed $500,000 for any related series of violations.

History: L. 1970, ch. 271, § 2; L. 1989, ch. 208, § 1; L. 1994, ch. 77, § 1; April 7.

66-1,152. Same; compromise of penalty; alternative to civil penalty. Any civil penalty may be compromised by the state corporation commission. In determining the amount of the penalty or the amount agreed in compromise, the

4-4

TESTIMONY BY CRAIG S. LAIRD ON BEHALF OF SOUTHWESTERN BELL TELEPHONE COMPANY TO THE SENATE UTILITY COMMITTEE REGARDING PROPOSED AMENDMENTS BY KANSAS GAS SERVICE TO SB 490, FEBRUARY 20, 2002.

Southwestern Bell opposes the amendments proposed by Kansas Gas Service (KGS) regarding K.S.A. 66-1813, a subsection of the Kansas Underground Utility Damage Prevention Act ("the Act").

KGS apparently proposes to amend K.S.A. 66-1813 to charge the Kansas Corporation Commission ("KCC") to make factual and legal rulings regarding violations of the Act before an injured operator is allowed to bring a civil action for damages under the Act.

Southwestern Bell opposes this proposed amendment primarily because of the logistical problems such a requirement would cause. The sheer number of damage claims experienced by Southwestern Bell in the State of Kansas each year would result in an undue burden on all parties, including the KCC, if the injured operator were required to obtain an administrative ruling on violation of the Act before proceeding in a civil action.

In calendar year 1999, Southwestern Bell had 2,991 damage claims in the State of Kansas that resulted in billing excavator who caused the damage. In 2000, there were 2,874 such claims, and in 2001 there were 1,922 billed claims. These were claims just for Southwestern Bell. If one takes into account all the other operators in the state who experience facility damages, a system of administrative determinations of liability would become overloaded and the parties would face long delays in having their disputes resolved.

The second concern Southwestern Bell has regarding the amendments proposed by KGS is the constitutionality of the administrative determination of violations of the Act. We do not believe that it was the intent of the legislature to have such disputes administratively determined, and thereby subjecting the injured party to lose their right to a trial by jury. Furthermore, the 180 day filing requirement proposed by KGS would abrogate the 2-year statute of limitations otherwise allowed by Kansas law for property damage claims.

COMMENTS OF THE CORPORATION COMMISSION STAFF
ON AMENDMENTS OFFERED TO SB490
FEBRUARY 20, 2002

Amendments noted in Kansas Corporation Commission Testimony

Page 4, Lines 20-24.

(b) If the operator has no underground facilities in the area of the proposed excavation, such operator, before the excavation start date, shall notify the excavator that it has no facilities in the area of proposed excavation by telephone, facsimile, marking the area all clear or by other technology that may be developed for such purposes.

Explanation of KCC Staff Position:

After an excavator makes a request for locates, he is told which utilities he can expect to provide locates based on the maps provided by the utility to the call center. Upon arrival at the excavation site, the excavator often does not see locate marks from all the utilities that were notified. This situation leads to the excavator placing an additional call to the call center because he perceives the utility has failed to respond to his first request for locates. It should be noted that the utility, through their maps provided to the call center, has warned the excavator that facilities may be present at his dig site. However, the possibility exists that the utility that did not mark had already determined they had no facilities at that location requiring locate marks. The second and subsequent requests from the excavator tend to swamp the system with requests, and it causes those that have previously marked to make repeated trips to the site.

Under the present statute, there is no requirement for the utility to provide marks if the excavation site is "all clear" of their underground facilities. In order to improve communications between excavators and utility operators, the SB 490 requires a limited version of positive response for all locate requests in which the utility has no facilities in the excavation site. The method of providing the "all clear" response should not be mandated but left to the discretion of the utility. The requirement to provide "all clear" positive response is expected to alleviate a major portion of the unnecessary locates associated with excavators making more than one request for an excavation site.

Page 5, Lines 5-11

(b) If an operator receives a request to locate its facilities for an emergency condition, such operator shall make a reasonable effort to identify the location of its facility within two hours of receiving notification or before excavation is scheduled to begin, whichever is later.
(c) Any person providing a misrepresentation of an emergency excavation may be subject to the penalties set out in K.S.A. 2001 Supp. 66-1812, and amendments thereto.

Explanation of KCC Staff Position:

The current statute exempts the excavator from waiting 2 days for locates before digging in the event of an emergency. The statute goes on to define an emergency as being a situation that involves danger or loss of service. In areas with congested underground, most excavators will not dig without locates unless absolutely necessary. It has long been the practice of Kansas utilities to provide locates within 2 hours if possible. The proposed change codifies this requirement that the utility make a reasonable effort to provide locates within 2 hours in emergency situations. The proposed change goes on to state that misrepresentation of an emergency, such as excavator scheduling problems, will be a violation of the act.

Page 5, Line 18-21

(b) An excavator using a trenchless excavation technique shall meet minimum operating guidelines as prescribed in rules and regulations developed and adopted by the state corporation commission in support of this act.

Explanation of KCC Staff Position:

Trenchless technology has grown in popularity over the past five years particularly for the installation of communications cable. Trenchless technology can be defined as all excavation techniques where the excavator can not see the cutting edge of the digging equipment. This would include boring, directional drilling, as well as some trenching techniques and cable plowing. In the case of boring, this technology allows utilities to be installed without open cuts through streets or across yards. In this process, the excavator can not see the point of excavation and has to rely on remote sensing of the cutting tool to plot his progress. Because trenchless excavation is being conducted without the ability to see the true location of buried facilities, there is a much larger chance that utilities will be damaged.

With the increase in directional activity, there has been a corresponding increase in damages and accidents. Sometimes the damages are severe such as gas line or large water line ruptures. Those are the ones we know about. It is unclear how many facilities have been damaged and are unknown to the excavator or the facility operator. In Kansas

within the last four years there have been three separate incidences of gas lines installed through sewer lines which were cut when the sewer line was cleaned. One of the sewer cleanouts resulted in an explosion of a house. A recent directional drilling mishap resulted in a grade school and office building on the north side of the capitol being evacuated because of gas leakage into the school and office building.

Because of the complexity in operating directional drilling equipment, SB 490 requires excavators to maintain training programs that establish minimum standards for their operation. The bill directs the Corporation Commission to prescribe regulations specifying the minimum operating guidelines that should be included in a training program. The regulatory approach is considered a better avenue to prescribe requirements in order to accommodate any improvements that may evolve for trenchless technology operations.

AMMENDMENTS OFFERED BY KANSAS GAS SERVICE AND SUPPORTED BY GREELEY GAS/ATMOS

Page 4, Lines 31-39

~~(c)~~ *(d)* If the operator notifies the excavator that it has no underground facilities in the area of the planned excavation, fails to respond or improperly marks the tolerance zone for the facilities, the excavator may proceed and shall not be liable for any direct or indirect damages resulting from contact with the operator's facilities, except that nothing in this act shall be construed to hold any excavator harmless from liability in those cases of gross negligence or willful and wanton conduct.
(e) All facilities installed by an operator after January 1, 2003, shall be locatable.

KGS Amendment
f) Failure of an operator to inform the excavator within two working days of the tolerance zone of the underground facilities of the operator in the manner required by K.S.A. 2001 Supp. 66-1806(a) shall not give rise to a cause of action on the part of the excavator against an operator for economic damages. Such failure may subject an operator to civil penalties as determined by, the State Corporation Commission.

KCC staff recommends against the KGS proposal.

The preceding paragraph is listed with the KGS amendment in order to combine the context of the act with the amendment. The Commission staff has always viewed our administrative role as only assuring compliance with the requirements of the KUUDPA, not awarding civil damages. If the intent of the KGS amendment is to require the KCC to offer a formal ruling on a probable violation before further civil action could be taken, the language of the amendment conflicts with that intent. As written, the excavator could not take action against an operator for economic damages if the operator failed to fulfill his obligations to accurately and timely mark the location of his facilities. This amendment as written would exempt the operator from any liability for idling the excavator's equipment while waiting on locates or waiting for the repair of a damaged facility. Under this scenario, the amendment does not appear to treat the excavator and operator with equal obligations.

KGS Amendment to K.S.A. 2001 Supp. 66-1813

Administration and enforcement by corporation commission.
This act shall be administered and enforced by the state corporation commission of the State of Kansas.
Any action for civil damages and attorney fees for violation of this act may be filed only after the state corporation commission has determined in a final order that the excavator, utility or other person has violated this act or any regulation established in rules and regulations promulgated by the state corporation commission. Any person claiming that an excavator, utility or other person has violated any provision of this act or any regulation adopted by the state corporation commission, shall be required to file such claim with the state corporation commission within 180 days of becoming aware of the violation.

6-4

KCC staff recommends against the KGS proposal.

This proposed amendment appears to support the intent mentioned in the above discussion. That is, the KCC would be required to make a formal ruling on a probable violation of the act before any action for civil damages could be taken by any party. In 2000, there were 5,864 incidents of damage to utilities that we know about resulting in $4,340,000 of repair costs. That does not include any intangible excavator losses such as idling equipment due to untimely locates. It is our belief the payment for these damages is settled between the parties. If the KCC was required to make a ruling on each of these cases, the workload would be staggering. The requirement to obtain a KCC ruling before any civil action could be taken may act as a deterrent to settling at the Commission level without a formal hearing. Potentially, this could lead to 6,000 formal Commission hearings per year. Several states have set up different forms of alternative dispute resolution comprised of all stakeholders that rule on damage claims. This is an avenue that could be pursued through regulation.

AMMENDMENTS OFFERED BY DAVID D. BACKER ON BEHALF OF SOUTHWESTERN BELL

(c) ''Excavation'' means any operation in which earth, rock or other material below the surface is moved or otherwise displaced by any means, except tilling the soil *for normal agricultural purposes*, or railroad or road and ditch maintenance that does not change the existing railroad grade, road grade and/or ditch flowline, or operations related to exploration and production of crude oil or natural gas, or both.
Normal agricultural purposes do not include excavation within any right of way or easement in which facilities have been placed

KCC staff recommends against the Southwestern Bell Telephone proposal.

Tilling the soil has been exempt from the definition of excavation, (and requiring locates), since the inception of KUUDPA. The reasoning behind this exemption is that underground utilities are relatively uncommon in agricultural areas. Those that do exist tend to be placed sufficiently deep to avoid damage from agricultural tilling. The limitation to the exemption as proposed in SB 490 is intended to distinguish between farming activity and landscaping activities which typically occur in areas congested with underground utilities. In many urban areas, phone lines and cable television lines are not placed at a depth sufficient to escape damage from landscaping activity. Mr. Backer's amendment to consider farmers tilling the soil as excavators has merit in the sense that it would increase safety and prevent damage. However, given the relative scarcity of underground facilities in agricultural areas, an educational effort to inform the farming community about underground structures seems to be a better approach than a regulatory requirement.

Page 1, Lines 28-31

28 (d) ''Excavator'' means any person who engages directly in excavation
29 activities within the state of Kansas, but shall not include any occupant
30 of a dwelling who: (1) Uses such dwelling as a primary residence; and (2)
31 excavates on the premises of such dwelling.

Southwestern Bell Telephone Proposal

28 (d) ''Excavator'' means any person who engages directly in excavation
29 activities within the state of Kansas~~, but shall not include any occupant~~
30 ~~of a dwelling who: (1) Uses such dwelling as a primary residence; and (2)~~
31 ~~excavates on the premises of such dwelling.~~

KCC staff recommends against the Southwestern Bell Telephone proposal.

Mr. Backer recommends requiring homeowners to be considered as excavators when digging on their property. Again, the limited amount of excavating that homeowners would do does not require a regulatory approach. An educational approach, such as the newspaper, television, and radio ads sponsored by Kansas One Call, Inc. appears to be satisfactory when dealing with this group. Every spring, homeowners planting trees or gardens constitute a large number of the calls received by the call center requesting locates which implies the educational message is well received.

Page 3, Lines 18-20

18 *(c) No person shall make repeated requests for remarking unless the*
19 *request is due to circumstances not reasonably within the control of such*
20 *person.*

Southwestern Bell Telephone offered amendment:
"No person shall make repeated requests for remarking, unless the request is to update a previous request, or the excavator knows or has reason to know, that the marks have been removed or altered."

KCC staff recommends against the Southwestern Bell Telephone proposal.

The proposed language of SB 490 is meant to control repeated locate requests for work where the excavator has no intent of completing or starting the proposed excavation. There have been examples where a locate request was kept valid for 6 months through repeated updates before the excavator began the work. This practice takes advantage of the operator's free locating service while burdening an already overloaded system with needless locates. The proposed language does not restrict an excavator from calling for updates if he has a valid reason. Mr. Backer's offered amendment would allow unlimited updates of locate requests.

Mr. Backer's proposal:

Further, we would propose a duty on the excavator to call for a re-locate in situations where the locate marks have been removed or altered. Therefore, we suggest either adding to this section or replacing it with:

"An excavator shall update its locate request when the excavator knows, or has reason to know, that the markings have been removed or altered."

This would place a duty on the excavator to call for a re-locate when the excavator knows that a facility is in the area, but the marks have faded or have been obliterated.

KCC staff recommends against Mr. Backer's proposal.

The KCC staff views maintenance of the markings provided by the utility operator as a factor in using reasonable care while excavating. Maintenance of marks includes not covering the marks with spoilage during the excavation. Not only does maintenance of the marks help in determining accuracy of the locates, it provides the excavator with a means of determining the tolerance zone of the marked facility as the excavation approaches that site. This issue will be addressed in the proposed regulation. K.S.A. 66-1806, (SB 490 Page 4, Lines 25-30) requires the operator to respond to a re-marking request within 1 day if the marks have been destroyed or altered.

SB 490 Page 4, Lines 25-30

~~(b)~~ *(c)* If the excavator notifies the notification center, within two working days after the initial identification of the tolerance zone by the operator, that the identifiers have been improperly removed or altered, the operator shall make a reasonable effort to re-identify the tolerance zone within one working day after the operator receives actual notice from the notification center.

Southwestern Bell Telephone proposed amendment:

~~(b)~~ *(c)* If the excavator notifies the notification center, ~~within two working days~~ after the initial identification of the tolerance zone by the operator, that the identifiers have been ~~improperly~~ removed or altered, the operator shall make a reasonable effort to re-identify the tolerance zone within one working day after the operator receives actual notice from the notification center.

KCC staff recommends against Mr. Backer's proposal.

The language of the current statute requires the operator to respond within one working day if the marks have been improperly altered. In order to limit the one day response requirement, the statute places a restriction on the excavator that he can only expect this immediate response for two working days after the original marking is complete; otherwise, any request for re-marking would be allowed two days to be completed. KCC Staff believes this paragraph was originally intended to accelerate re-marking of a site should the marks or flags be moved before the excavation had begun. Once the excavation was underway, maintenance of the marks is the responsibility of the excavator or he must postpone work while additional locates are requested.

Mr. Backer's proposal would require response from operators within one working day for all updates to a locate. This requirement would significantly increase the number of locates that would need to be completed and it would hinder the ability of the locator to plan his route of locates since he would be working off of two time deadlines.

SB 490 Page 5, Line 37

Sec. 8. K.S.A. 2001 Supp. 66-1811 is hereby amended to read as follows: 66-1811. (a) In a civil action in a court of this state when it is shown by competent evidence that personal injury, death or other damages~~,~~ ~~including damage to any underground facilities,~~ occurred as a result of a violation of this act, there shall be a rebuttable presumption of negligence on the part of the violator.

Mr. Backer's proposed amendment:

Sec. 8. K.S.A. 2001 Supp. 66-1811 is hereby amended to read as follows: 66-1811. (a) In a civil action in a court of this state when it is shown by competent evidence that personal injury, death or other damages, including damage to any underground facilities, occurred as a result of a violation of this act, there shall be a rebuttable presumption of negligence on the part of the violator.

KCC staff has no position on Mr. Backer's proposal.

In SB 490, the phrase "including damage to any underground facilities" is proposed to be stricken because it is viewed as redundant. It also leads to the perception that only operators suffer damage as a result of violations of KUUDPA.

AMMENDMENTS OFFERED BY KANSAS TRIAL LAWYERS ASSOCIATION

SB 490 Page 4, Line 31 to 37, (K.S.A 66-1806 (d))

~~(c)~~ *(d)* If the operator notifies the excavator that it has no underground facilities in the area of the planned excavation, fails to respond or improperly marks the tolerance zone for the facilities, the excavator may proceed and shall not be liable for any direct or indirect damages resulting from contact with the operator's facilities, except that nothing in this act shall be construed to hold any excavator harmless from liability in those cases of gross negligence or willful and wanton conduct.

Kansas Trial Lawyers Proposed Amendment

~~(c)~~ *(d)* If the operator notifies the excavator that it has no underground facilities in the area of the planned excavation, fails to respond or improperly marks the tolerance zone for the facilities, the excavator may proceed and shall not be liable <u>to the operator</u> for any direct or indirect damages resulting from contact with the operator's facilities, except that nothing in this act shall be construed to hold any excavator harmless <u>to the operator</u> from liability in those cases of gross negligence or willful and wanton conduct.

KCC staff has no position on the proposed change.

As it was written in the 1993 statute, no part of KUUDPA allows an excavator to be grossly negligent. Paragraph 66-1806(d) states that the excavator may proceed with his work without locate marks if he has waited the required amount of time, and provided that any work he begins is done without gross negligence. Under this scenario he is not held liable for any damages that may occur in spite of his action as long as that action is not grossly negligent. KTLA's amendment would allow suit by third parties against the excavators for any type of negligent action, not just grossly negligent actions.

SB 490 Page 5, Lines 34- 42, (K.S.A. 66-1811)

Sec. 8. K.S.A. 2001 Supp. 66-1811 is hereby amended to read as follows: 66-1811. (a) In a civil action in a court of this state when it is shown by competent evidence that personal injury, death or other damages, including damage to any underground facilities, occurred as a result of a violation of this act, there shall be a rebuttable presumption of negligence on the part of the violator.

(b) The provisions of subsection (a) shall not apply if the operator whose underground facilities are damaged fails to participate in the notification center.

Kansas Trial Lawyers Proposed Amendment

Sec. 8. K.S.A. 2001 Supp. 66-1811 is hereby amended to read as follows: 66-1811. (a) In a civil action in a court of this state when it is shown by competent evidence that personal injury, death or other damages, including damage to any underground facilities, occurred as a result of a violation of this act, there shall be a rebuttable presumption of negligence on the part of the violator.

~~(b) The provisions of subsection (a) shall not apply if the operator whose underground facilities are damaged fails to participate in the notification center.~~

KCC staff has no position on the proposed change.

This provision does not allow the rebuttable presumption of negligence to apply if the operator failed to mark his facilities because he was not notified by the call center. KCC staff believes this provision was a result of the call center not being fully recognized at the time of the initial legislation in 1993. KCC Staff believes the provision was intended to allow some leeway to educate operators on the requirements of the law.

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Members of the Senate Utilities Committee

FROM: Terry Humphrey, executive director
Kansas Trial Lawyers Association

RE: SB 490

DATE: Feb. 20, 2002

Following the first hearing on SB 490, you requested that we review the amendments offered by the other conferees. We urge the committee to adopt KTLA's amendments. KTLA opposed SB 490 as it was originally written because it grants statutory immunity to negligent excavators who injure innocent third parties. KTLA's amendments, which are attached, assure excavators are held accountable and responsible to third-parties who are injured or harmed.

We respectfully submit our comments to the committee on those amendments:

Kansas Corporation Commission
We have talked with Leo Haynos, chief of pipeline safety for the Kansas Corporation and have no problems with the amendments offered by the KCC. Mr. Haynos indicated to us that likewise, the KCC is neutral on the amendments offered by KTLA.

Kansas Gas Service
Amendment 1: KTLA opposes this change to current law.
Amendment 2: KTLA would oppose this amendment unless the bill specifies that the violations occurred between the excavator and the operator.
Amendment 3: KTLA opposes limiting the statute of limitations to six months.

Southwestern Bell Telephone Co.
Amendment 1: KTLA opposes this amendment because it puts an undue burden on the farmer.
Amendment 2: KTLA opposes this amendment because it puts an undue burden on the homeowner.
Amendment 3: KTLA is neutral on this amendment.
Amendment 4: KTLA would oppose deleting the "within two working days" requirement. We agree that an excavator should request a locate immediately or within two working days.
Amendment 5: KTLA opposes leaving in "including damage to any underground facilities." (Page 5/line 37) As we stated in our testimony, deleting this language in Sec. 8(a) makes Sec. 8 (b) unnecessary.

Again, we appreciate the opportunity to offer our comments and we urge the committee to adopt our amendments.

Senate Utilities Committee
February 20, 2002
Attachment 7-1

Terry Humphrey, Executive Director

Jayhawk Tower • 700 SW Jackson, Suite 706 • Topeka, Kansas 66603-3758 • 785.232.7756 • Fax 785.232.7730

E-Mail: triallaw @ ink.org

Session of 2002

SENATE BILL No. 490

By Committee on Utilities

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AN ACT amending the Kansas underground utility damage prevention act; concerning certain regulations thereof; amending K.S.A. 2001 Supp. 66-1802, 66-1804, 66-1805, 66-1806, 66-1807, 66-1809, 66-1810, 66-1811 and 66-1812 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 2001 Supp. 66-1802 is hereby amended to read as follows: 66-1802. As used in this act:

(a) "Damage" means any impact or contact with an underground facility, its appurtenances or its protective coating, or any weakening of the support for the facility or protective housing which requires repair.

(b) "Emergency" means any condition constituting a clear and present danger to life, health or property, or a customer service outage.

(c) "Excavation" means any operation in which earth, rock or other material below the surface is moved or otherwise displaced by any means, except tilling the soil *for normal agricultural purposes*, or railroad or road and ditch maintenance that does not change the existing railroad grade, road grade and/or ditch flowline, or operations related to exploration and production of crude oil or natural gas, or both.

(d) "Excavator" means any person who engages directly in excavation activities within the state of Kansas, but shall not include any occupant of a dwelling who: (1) Uses such dwelling as a primary residence; and (2) excavates on the premises of such dwelling.

(e) "Facility" means any underground line, system or structure used for gathering, storing, conveying, transmitting or distributing gas, electricity, communication, crude oil, refined or processed petroleum, petroleum products or hazardous liquids; facility shall not include, any production petroleum lead lines, salt water disposal lines or injection lines, which are located on unplatted land or outside the corporate limits of any city.

(f) "Locatable facility" means facilities for which the tolerance zone can be determined by the operator using generally accepted practices such as as-built construction drawings, system maps, probes, locator devices or any other type of proven technology for locating.

~~(f)~~ *(g)* "Marking" means the use of stakes, paint, *flags* or other clearly

identifiable materials to show the field location of underground facilities, in accordance with the ~~resolution adopted August, 1984, by~~ *resolutions of* the utility location coordination council of the American public work association.

~~(g)~~ *(h)* "Municipality" means any city, county, municipal corporation, public district or public authority located in whole or in part within this state which provides firefighting, law enforcement, ambulance, emergency medical or other emergency services.

~~(h)~~ *(i)* "Notification center" means the statewide communication system operated by an organization which has as one of its purposes to receive *and record* notification of planned excavation in the state from excavators and to disseminate such notification of planned excavation to operators who are members and participants.

~~(i)~~ *(j)* "Operator" means any person who owns or operates an underground facility, except for any person who is the owner of real property wherein is located underground facilities for the purpose of furnishing services or materials only to such person or occupants of such property.

~~(j)~~ *(k)* "Preengineered project" means a public project or a project which is approved by a public agency wherein the public agency responsible for the project, as part of its engineering and contract procedures, holds a meeting prior to the commencement of any construction work on such project in which all persons, determined by the public agency to have underground facilities located within the construction area of the project, are invited to attend and given an opportunity to verify or inform the public agency of the location of their underground facilities, if any, within the construction area and where the location of all known and underground facilities are duly located or noted on the engineering drawing as specifications for the project.

~~(k)~~ *(l)* "Permitted project" means a project where a permit for the work to be performed must be issued by a city, county, state or federal agency and, as a prerequisite to receiving such permit, the applicant must locate all underground facilities in the area of the work and in the vicinity of the excavation and notify each owner of such underground facilities.

~~(l)~~ *(m)* "Person" means any individual, partnership, corporation, association, franchise holder, state, city, county or any governmental subdivision or instrumentality of a state and its employees, agents or legal representatives.

~~(m)~~ *(n)* "Tolerance zone" means the area within 24 inches of the outside dimensions in all horizontal directions of an underground facility.

(o) "Update" means an additional request from the excavator to extend the time period of the request for intent to excavate beyond the 15 calendar day duration of the request.

(p) "Whitelining" means the act of marking by the excavator the route

In accordance w/ rules/regs promulgated by State corp comm

or boundary of the proposed excavation site with white paint, white stakes or white flags.

~~(n)~~ *(q)* "Working day" means every day~~, except Saturday, Sunday or a legally proclaimed local, state or federal holiday~~ *Monday through Friday beginning at 12:01 a.m., except for the following officially recognized holidays: New Year's day, Memorial day, Independence day, Labor day, Thanksgiving day, the day after Thanksgiving and Christmas.*

Sec. 2. K.S.A. 2001 Supp. 66-1804 is hereby amended to read as follows: 66-1804. (a) *Except in the case of an emergency,* an excavator shall serve notice of intent of excavation at least two full working days, but not more than ~~10 working~~ *15 calendar* days before ~~commencing the excavation activity~~ *the scheduled excavation start date,* on each operator having underground facilities located in the proposed area of excavation.

(b) The notice of intent to excavate or any subsequent updates shall be valid for 15 calendar days after the excavation start date and such notice shall only describe an area in which the proposed excavation reasonably can be completed within the 15 calendar days.

(c) No person shall make repeated requests for remarking unless the request is due to circumstances not reasonably within the control of such person.

~~(b)~~ *(d)* The notice of intent of excavation shall contain the name, address and telephone number of the person filing the notice of intent, the name of the excavator, the date the excavation activity is to commence and the type of excavation being planned. The notice shall also contain the specific location of the excavation if it is to take place within the boundaries of a city or the specific quarter sections if outside the boundaries of any city.

(e) The person filing the notice of intent to excavate shall whiteline the proposed excavation site when the description of the excavation location cannot be described with sufficient detail to enable the operator to ascertain the precise tract or parcel involved.

~~(c)~~ *(f)* The provisions of this section shall not apply to a preengineered project or a permitted project, except that the excavators shall be required to give notification in accordance with this section prior to starting such project.

Sec. 3. K.S.A. 2001 Supp. 66-1805 is hereby amended to read as follows: 66-1805. (a) This act recognizes ~~the value of and encourages and authorizes~~ the establishment of a single notification center *for the state of Kansas. The notification center shall provide prompt notice to each affected member of any proposed excavation.* Each operator who has an underground facility shall become a member of the notification center.

(b) ~~Upon the establishment of a notification center in compliance with this act,~~ Notification, as required by K.S.A. 2001 Supp. 66-1804, *and*

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amendments thereto, to operators shall be given by notifying the notification center by telephone at the toll free number *or by other communication methods approved by the notification center*. The content of such notification shall be as required by K.S.A. 2001 Supp. 66-1804, *and amendments thereto*.

(c) Each operator who has an underground facility within the state shall be afforded the opportunity to become a member of the notification center on the same terms as the original members.

(d) A suitable record shall be maintained by the notification center to document the receipt of notices from excavators as required by this act.

Sec. 4. K.S.A. 2001 Supp. 66-1806 is hereby amended to read as follows: 66-1806. (a) *Within two working days, beginning on the first working day after the excavator has filed notice of intent to excavate*, an operator served with notice ~~shall, in advance of the proposed excavation,~~ unless otherwise agreed between the parties, *shall* inform the excavator of the tolerance zone of the underground facilities of the operator in the area of the planned excavation by marking, flagging or other acceptable method ~~no sooner than two working days prior to planned excavation~~.

(b) If the operator has no underground facilities in the area of the proposed excavation, such operator, before the excavation start date, shall notify the excavator that it has no facilities in the area of proposed excavation by telephone, facsimile, marking the area all clear or by other technology that may be developed for such purposes.

~~(b)~~ *(c)* If the excavator notifies the notification center, within two working days after the initial identification of the tolerance zone by the operator, that the identifiers have been improperly removed or altered, the operator shall make a reasonable effort to reidentify the tolerance zone within one working day after the operator receives actual notice from the notification center.

~~(c)~~ *(d)* If the operator notifies the excavator that it has no underground facilities in the area of the planned excavation, fails to respond or improperly marks the tolerance zone for the facilities, the excavator may proceed and shall not be liable for any direct or indirect damages resulting from contact with the operator's facilities, except that nothing in this act shall be construed to hold any excavator harmless from liability in those cases of gross negligence or willful and wanton conduct.

to the operator

to the operator

(e) All facilities installed by an operator after January 1, 2003, shall be locatable.

Sec. 5. K.S.A. 2001 Supp. 66-1807 is hereby amended to read as follows: 66-1807. *(a)* In the case of an emergency which involves danger to life, health or property or which requires immediate correction in order to continue the operation of an industrial plant or to assure the continuity

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of public utility service, excavation, maintenance or repairs may be made without using explosives, if notice and advice thereof, whether in writing or otherwise are given to the operator or notification center as soon as reasonably possible.

(b) If an operator receives a request to locate its facilities for an emergency condition, such operator shall make a reasonable effort to identify the location of its facility within two hours of receiving notification or before excavation is scheduled to begin, whichever is later.

(c) Any person providing a misrepresentation of an emergency excavation may be subject to the penalties set out in K.S.A. 2001 Supp. 66-1812, and amendments thereto.

Sec. 6. K.S.A. 2001 Supp. 66-1809 is hereby amended to read as follows: 66-1809. *(a)* Upon receiving information as provided in K.S.A. 2001 Supp. 66-1806, *and amendments thereto,* an excavator shall exercise such reasonable care as may be necessary for the protection of any underground facility in and near the construction area when working in close proximity to any such underground facility.

(b) An excavator using a trenchless excavation technique shall meet minimum operating guidelines as prescribed in rules and regulations developed and adopted by the state corporation commission in support of this act.

Sec. 7. K.S.A. 2001 Supp. 66-1810 is hereby amended to read as follows: 66-1810. When any contact with or damage to any underground facility occurs, the operator shall be informed immediately by the excavator. Upon receiving such notice, the operator immediately shall dispatch personnel to the location to provide necessary temporary or permanent repair of the damage. If the protective covering of an electrical line is penetrated or dangerous gases or fluids are escaping from a broken line, the excavator immediately shall inform emergency personnel of the municipality in which such electrical short or broken line is located *and take any other action as may be reasonably necessary to protect persons and property and to minimize hazards until arrival of the operator's personnel or emergency first responders.*

Sec. 8. K.S.A. 2001 Supp. 66-1811 is hereby amended to read as follows: 66-1811. (a) In a civil action in a court of this state when it is shown by competent evidence that personal injury, death or other damages, ~~including damage to any underground facilities,~~ occurred as a result of a violation of this act, there shall be a rebuttable presumption of negligence on the part of the violator.

~~(b) The provisions of subsection (a) shall not apply if the operator whose underground facilities are damaged fails to participate in the notification center.~~

~~(c)~~ (b) In no event shall the excavator be responsible for any damage to

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underground facilities if such damage was caused by the failure of the operator to correctly and properly mark the location of the tolerance zone of the damaged facility.

~~(d)~~ (c) Nothing in this act is intended to limit or modify the provisions of:

(1) K.S.A. 60-258a, and amendments thereto; or

(2) the national electrical safety code, which would otherwise be applicable.

Sec. 9. K.S.A. 2001 Supp. 66-1812 is hereby amended to read as follows: 66-1812. Any person to whom this act applies, who violates any of the provisions contained in this act, shall be subject to civil penalties and injunctive relief as set out in K.S.A. 66-1,151, and amendments thereto, *and any remedies established in rules and regulations promulgated by the state corporation commission in support of this act.*

Sec. 10. K.S.A. 2001 Supp. 66-1802, 66-1804, 66-1805, 66-1806, 66-1807, 66-1809, 66-1810, 66-1811 and 66-1812 are hereby repealed.

Sec. 11. This act shall take effect and be in force from and after its publication in the statute book.

STATEMENT IN SUPPORT OF SENATE BILL NO. 547

The Rural Kansas Self-Help Gas Act

My name is David Pierce. I am a Professor of Law at Washburn University School of Law where I teach courses in Oil and Gas Law and Energy Law. I am appearing here today, in my personal capacity, at the request of the Southwest Kansas Irrigation Association.

The goal of Senate Bill No. 547 is to eliminate obsolete regulatory impediments to providing rural Kansas homes, farms, and businesses with natural gas service. There has never been a natural gas equivalent to the Rural Electrification Act which brought electric service to over 99% of rural homes in America. As the title of this Bill indicates, the Rural Kansas *Self-Help* Gas Act is designed to allow Kansans living in rural areas to help themselves by constructing the pipeline infrastructure, at their own risk and expense, required to access secure gas supplies.

Although Kansas has an extensive intrastate and interstate pipeline network, and abundant gas supplies, many areas outside city limits lack the distribution network required to move gas to where it can be used. In some Western Kansas areas the traditional distribution network has been through gathering systems used to move gas from oil and gas wells to intrastate and interstate pipelines. Many of these gathering systems are no longer suitable as distribution systems and many rural Kansans are finding themselves without gas service for the first time.

There are two regulatory impediments rural Kansans face when they try and engage in self-help efforts. First, there is the risk that they, or those who assist them in obtaining or moving gas, will be deemed a "public utility." The definition of "public utility" under Kansas law is quite broad and the Kansas Legislature, on numerous occasions, has taken action to expressly exempt defined activities from its reach. For example, in 1997 the Kansas Legislature expressly exempted "gas gathering systems" from the definitions of "public utility" and "common carrier." K.S.A. § 66-105a (Supp. 2001). The proponents of Senate Bill No. 547 ask that you do the same for rural gas users.

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February 20, 2002
Attachment 8-1

The second regulatory impediment is the existence of "certificated areas" which are granted to public utilities when they obtain a "certificate" from the Kansas Corporation Commission to conduct business in an area. The purpose of the protected certificated area is to allow the utility to make the investment in infrastructure necessary to fully serve the area without competition from "cherry-pickers" seeking to serve the most desirable high-volume, low-cost customers. In the rural Kansas setting the existence of large certificated areas can actually retard infrastructure development by preventing individuals from pursuing self-help efforts. One utility in Seward County has over 200 sections of land in its certificated area but only a small portion of the area is actually served by distribution systems. Under this regulatory system the utility becomes the cherry-picker; seeking to extend service only to the high-volume, low-cost customers while having no real economic interest in developing a distribution network to serve the typical rural Kansas homestead.

Senate Bill No. 547 would change this situation by allowing the rural gas user, either individually or in combination as a Nonprofit Public Utility, to construct the necessary distribution networks to serve their personal gas needs without becoming a public utility and without having to fight for access to gas supplies because of a utility's certificated area. This Bill will empower those without adequate gas service to take the action necessary to help themselves. In the process gas distribution infrastructure that has not been pursued during the past 70 years--by those controlling the certificated areas--can be pursued by Kansans who have a direct interest in obtaining gas service for their homes, farms, and businesses. Senate Bill 547 creates the incentive to construct gas distribution infrastructure in previously neglected areas which will provide new economic development opportunities for all involved.

The proponents of this Bill are not asking for a hand-out. They are merely asking that barriers created by a 1911 statute designed to protect densely populated service areas be removed so they can efficiently pursue real natural gas service for themselves and rural Kansas. Thank you for the opportunity to state my views on this important matter.

David E. Pierce

David E. Pierce

MEMORANDUM OF LAW

TO: **Southwest Kansas Irrigation Association**
922 W. Oklahoma
Ulysses, Kansas 67880

FROM: **David E. Pierce**

SUBJECT: **Existing Constraints on Self-Help Efforts to Obtain Gas Service in Rural Kansas**

DATE: **21 January 2002**

I. SUMMARY OF PROBLEM AND SUGGESTED SOLUTION

There has been no natural gas equivalent to "rural electrification."[1] As a result, vast areas of rural Kansas are without the pipeline distribution systems necessary to bring natural gas to their homes, farms, and other rural businesses. Although there is an extensive intrastate and interstate pipeline network throughout Kansas, and an abundant supply of natural gas, there is often no entity willing to invest the capital to extend service from these gas transportation facilities to potential natural gas users.

Even when a potential gas user is willing to engage in self-help by spending the money to build the necessary pipeline to connect their property to the existing pipeline network, their efforts are often thwarted by protected "certificated areas." The certificated area, in the rural Kansas setting, permits a public utility, often with no investment other than a meter,[2] to position itself between the rural gas user and the pipeline network they are trying to access. The toll that must be paid to this public utility

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[1]The Rural Electrification Act of 1936 created the Rural Electrification Administration (REA) to bring electricity to rural America. As a result, 99% of rural homes have electric service.

[2]The meter operator, at some point in time, may have also paid a sum of money to acquire the tap that connects the meter into the pipeline. In most instances these investments will have been recovered many times over for any existing meter facilities.

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with the meter is often over 50¢ per thousand cubic feet of gas.[3] The certificated area is the legal device that turns a simple gas meter into a cash register for its owner. In return, the only "service" provided by the meter operator is access to what would otherwise be an "open access" pipeline. The meter operator does not construct or operate any gas distribution lines; all risk and expense associated with providing the distribution system connecting the rural gas user's property to the meter is placed on the gas user. No meaningful service is offered. The certificated area, as applied in the rural gas context, is a gross perversion of public utility concepts.

There is a simple legislative solution to this problem which provides rural gas users with the opportunity to help themselves once regulatory barriers and uncertainties are removed. This can be accomplished by providing that any rural gas user who constructs its own pipeline connection to a gas pipeline network will not be considered a public utility; nor will they be subject to any restrictions associated with a public utility's certificated service area. The solution would not unduly interfere with any existing distribution system investments because the "rural gas user" would be defined to include: (1) only those persons located outside a city's corporate boundary; and (2) not presently receiving gas from a public utility that has constructed, owns, and operates an existing gas service line from its distribution system to the point of service physically located on the property being served. Where two or more persons combine pursuant to K.S.A. § 66-104c (Supp. 2000) to operate as a nonprofit public utility (NPU), they should be able to enjoy the same exemption from another public utility's certificated service area whenever they meet the same qualifying conditions: the person participating in the NPU is a "rural gas user" as defined above.

II. STATEMENT OF FACTS

Today if a rural Kansas resident desires natural gas service, it is truly a self-help process to identify the potential gas pipeline sources for gas and then arrange for construction of all the necessary facilities, at the resident's sole risk and expense, to access the gas sources. To illustrate the problem, representatives of the Southwest Kansas Irrigation Association provided the attached "Example #1" to illustrate the situation. Picture #1 shows a gas pipeline, classified as a "gas gathering system," which was constructed to collect gas from area gas wells and transport it to a larger network of transportation pipelines. This particular pipeline is owned by Duke Energy Field

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[3]This is not to purchase any gas; it is merely to allow the gas the rural gas customer has already purchased to flow through the meter. Depending upon the current price of gas, this could be up to 25% or more of the total cost of gas flowing through the meter.

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Services. Picture #2 shows a rural gas user that is located next to the Duke pipeline. However, the rural gas user is prevented from dealing with Duke pipeline because a public utility, in this case Peoples Natural Gas, has been granted the right to "serve" a huge geographic area encompassing over 200 sections of land in Seward County. Because Peoples holds this "certificated area" it is able to prevent the farmer from purchasing its own meter and pipeline tap to obtain transportation services from the Duke pipeline, or any other gas pipeline that may be close to his land, to provide his irrigation gas needs. The farmer must pay for all connection costs and fittings.[4] Under the authority to "serve" the farmer, Peoples is able to charge $22.50 per month as a "facility charge" plus a "delivery charge" of 52¢ for every thousand cubic feet (Mcf)[5] of gas delivered through the meter.

The "service" Peoples is providing in this situation is clearly defined, by Peoples, in a series of "Dear Valued Customer" letters which state, in part:

> As a natural gas customer served from a gas gathering system, you are receiving service from Peoples Natural Gas.[6] Peoples obtained the right to serve you from the gathering system or the pipeline company that owns the facilities that run near or across your property.[7] ***The facilities used by Peoples to deliver your gas requirements are not owned, controlled, managed or operated by Peoples; the lines are totally controlled by the owner of the gathering system.***[8]

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[4]Picture #3 in the Example shows that even though these homeowners are within the Peoples "service" area, they must build their own pipelines and related service connections to access the gas supply. Peoples, in this particular instance, does not have any sort of pipeline distribution system you would normally associate with a protected certificated service area.

[5]Although the "Delivery Charge" is stated in the applicable tariff as "$0.05200 per Therm Delivered," the standard transportation measurement for gas is by dekatherm. One dekatherm consists of one million British thermal units (MMBtus) which equates to the more common volumetric expression of one thousand cubic feet (Mcf) where each cubic foot of gas has a heating value of 1000 Btus. Therefore, the tariff expression of $0.05200 per Therm is equal to 52¢ per Mcf of gas.

[6]In this case, that service is reading a meter.

[7]This is the "certificated area" Peoples was granted.

[8]This statement reflects that Peoples has nothing to do with the physical transportation or management of the gas supply. Its only investment is in a meter accessing a pipeline.

When problems develop concerning the delivery of gas, Peoples has no responsibility to try and solve the problem. Their sole responsibility is to read their meter and send a bill for their metering "services." They own no gas, no pipeline, and no facilities other than the meter.[9] When problems develop, the rural gas user is left, again, to their own devices to try and solve the problem–at their sole risk and expense.

In many instances following these "Dear Valued Customer" letters the ability to obtain gas through the Peoples meter ceased. That is why Peoples sent the letters: to make it perfectly clear that Peoples had no obligation to provide the impacted farmers with any help regarding their gas needs. The farmer was on their own. However, if the farmer was able to build new pipelines to new gas supplies, Peoples, as the grantee of the "certificated area," would be there to make sure it could get between the farmer and its new gas supply with Peoples' meter "service." Responding to the inability to continue obtaining gas in these situations, many farmers resorted to self-help by forming or joining a nonprofit public utility (NPU) provided for in Kansas Statutes Annotated (K.S.A.) § 66-104c.[10]

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[9]In some instances the public utility may not even own the meter and the connecting facilities.

[10]Kan. Stat. Ann. § 66-104c (Supp. 2000). This statute provides, as follows:

> (a) Except as otherwise provided in subsection (b), no nonprofit public utility shall be subject to the jurisdiction, regulation, supervision and control of the state corporation commission if the utility meets the following conditions:
>
> (1) Every customer, shareholder, household or meter owner is an owner of the utility and has an equal vote on matters concerning the utility;
>
> (2) the utility employs no full-time employees; and
>
> (3) the utility has not more than 100 customers, provided that customer additions resulting from sales or transfers of real property or rights in tenancy shall not be counted for purposes of determining the maximum number of customers.
>
> (b) The state corporation commission shall retain jurisdiction and control over the service territory of a utility described in subsection (a) and over all matters concerning natural gas pipeline safety.

However, it is not clear whether the formation of such a NPU will avoid having a for-profit public utility, such as Peoples, try to insert itself between the NPU and any available gas pipeline system within a "certificated area." In this regard K.S.A. § 66-104c(b) makes the NPU subject to Kansas Corporation Commission (KCC) "jurisdiction and control over the service territory" the NPU can serve. The risk is that once the farmer engaged in their self-help efforts, and formed or connected to a NPU to provide it alternative service, the public utility holding a certificate encompassing the farmer's land (such as Peoples) would protest the NPU's proposed service. This is also highlighted in the Peoples "Dear Valued Customer" letter where it states: "It is not our intention to abandon service to any of our customers." Although Peoples denies any responsibility for providing, obtaining, or maintaining gas or gas transportation services, it is nevertheless indicating, in no uncertain terms, it remains willing to operate a meter and collect a $22.50 per month fee plus 52¢ for every Mcf of gas that flows through the meter--in the event the farmer is resourceful enough[11] to solve his own gas supply and transportation problems.

III. THE APPLICABLE LAW

A. The Certificate and the "Certificated Area"

Public utility regulation is unique because it controls all aspects of the regulated entity's business. Someone desiring to engage in pubic utility activities must first obtain permission from the KCC in the form of a "certificate . . . that public convenience will be promoted" by their entry into the business.[12] When a certificate is granted the public utility must provide the level of service specified in the certificate. In return for undertaking to provide the service, the certificate typically sets out a stated certificated area in which the certificate holder will have the exclusive right to provide certificated services.[13] The theory is that by granting exclusive service rights in an area the

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[11]To include building alternative pipeline connections or, as suggested in one of Peoples' "Dear Valued Customer" letters, having the farmer "install a compressor at their [the farmer's] expense to maintain their supply pressure."

[12]Kan. Stat. Ann. § 66-131 (1992).

[13]The source of the certificated area authority is K.S.A. § 66-131. For example, in *United Cities Gas Co. v. Brock Exploration Co.*, 995 F. Supp. 1284 (D. Kan. 1998), the court observed:

> A 'certificated area' is a region in which the Kansas Corporation Commission . . . has granted a common carrier or public utility the authority to transact business

utility will invest in the capital improvements necessary to provide service to its customers.

However, if the utility is not in fact required to provide a service, but they have the exclusive and protected right to serve, a service deficiency can arise. The existence of the certificated area will deter other potential service providers from entering the market. It will even deter the party needing the service from engaging in self-help efforts. The public utility will protect its certificated area from any new entrants that threaten its existing monopoly on the limited service it currently provides, or which seek to engage in what the utility views as the more lucrative ventures related to services it does not currently provide. The risk of the utility claiming someone is infringing on their certificated territory is a major deterrent to creative, competitive, self-help solutions to getting gas from the wells and pipelines of Kansas into rural homes, farms, and businesses.

As an example of the risk associated with self-help activities within an existing certificated area, consider the case of *United Cities Gas Company v. Brock Exploration Company*[14] where Brock, an oil and gas operator, was held to have infringed on the exclusive certificated area granted by the KCC to United Cities, a local gas distribution company. Brock had arranged to sell gas to an industrial customer that was within United Cities' service area. The KCC found that Brock's activities made it a "public utility" and since it had not obtained a certificate to engage in utility services, its gas sales were illegal.[15] United Cities then sued Brock to recover damages under K.S.A. § 66-176 for engaging in illegal public utility activities.[16] Although K.S.A. § 66-176 was probably

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> falling within the Commission's regulatory jurisdiction. . . . The KCC confers this authority by issuing a certificate of convenience and necessity. *See* K.S.A. 66-131.

United Cities, 995 F. Supp. at 1289.

[14]995 F. Supp. 1284 (D. Kan. 1998).

[15]As a violation of K.S.A. § 66-131 which establishes the certificate requirement.

[16]*United Cities*, 995 F. Supp. at 1289. K.S.A. § 66-176, in its present form, states:

> Any public utility or common carrier which violates any of the provisions of law for the regulation of public utilities or common carriers shall forfeit, for every offense, to the person, company or corporation aggrieved thereby, the actual damages sustained by the party aggrieved together with the costs of suit and reasonable attorney fees, to be fixed by the court. If an appeal is taken from the judgment or any part thereof, it shall be the duty of the appellate court to include in the judgment additional reasonable attorney fees for services in the appellate

conceived as a statute to allow the public to sue a "public utility" for wrong-doing, the *United Cities* case turns it into a weapon that can be used *by* the public utility against anyone that might be classified as a "public utility" or "common carrier." This means that if a farmer's self-help activities are subsequently classified as those of a "public utility," the complaining utility having the certificated area where the farmer lives can pursue the matter with the KCC, sue the farmer for damages, and then obligate the farmer to pay the utility's attorney fees. This magnifies the practical impact of an existing certificated area by providing it with an even wider reach because gas users, and gas marketers and other industry participants otherwise willing to assist the gas user, will be reluctant to run the risk of being classified a "public utility" and incur the associated litigation risks. This risk is further magnified because it is difficult to identify the line between the "public utility" and "private use."

B. "Public Utility" or "Private Use"

The broad definitions of "public utility" and "common carrier" in Kansas utility law create uncertainty when attempting to define exempt private gas service activities from those subject to KCC jurisdiction. K.S.A. § 66-104 defines the term "public utility" to include any person or entity:

> [T]hat . . . own, control, operate or manage, except for private use, any equipment, plant or generating machinery . . . for the conveyance of . . . gas through pipelines in or through any part of the state, except pipelines less than 15 miles in length and not operated in connection with or for the general commercial supply of gas . . . , and all companies for the production, transmission, delivery or furnishing of heat, light, water or power.[17]

K.S.A. § 66-105 defines "common carrier" to include "all . . . pipe-line companies, and all persons and associations of persons . . . operating such agencies for public use in the conveyance of . . . property within this state."[18] Because these definitions do not provide a bright-line division between the regulated public utility and unregulated private use, they retard the development of innovative

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court or courts.

Kan. Stat. Ann. § 66-176 (Supp. 2000).

[17]Kan. Stat. Ann. § 66-104 (Supp. 2000).

[18]Kan. Stat. Ann. § 66-105 (1992).

solutions to gas supply problems. If you are deemed a "public utility," the party engaging in the activity, the facilities used, and the activity itself will all be subject to KCC regulation. However, if deemed a "private use" the KCC in most instances will have no direct authority over the matter. It is an all-or-nothing proposition: either you are a public utility[19] or you are not.

K.S.A. § 66-104 defines two potential categories of "private use." They include:

1. Those who own, control, operate or manage equipment, plant, or machinery for the conveyance of gas through pipelines for private use.

2. Those who own, control, operate or manage equipment, plant, or machinery for the conveyance of gas through pipelines for private use, or public use, when the pipeline is less than 15 miles in length and not operated for the "general commercial supply of gas . . . ."

The "common carrier" definition is broader than the public utility statutes and could encompass a pipeline that is less than 15 miles in length so long as it is used "for public use in the conveyance of . . . property within this state."[20] Therefore, the determinative question in most cases will be whether the activity can be classified as a "private use" as opposed to a "public use."

The Kansas Supreme Court, in *Water District No. 1 of Johnson County v. Mission Hills Country Club*,[21] had an opportunity to discuss the scope of K.S.A. § 66-104. Mission Hills was attempting to transport water from outside of Water District No. 1 instead of purchasing water from the District. After the court concluded the District had the exclusive right to provide water services to the Mission Hills property, Mission Hills argued K.S.A. § 66-104 supported its contention that "'the accepted rule in Kansas is that utility customers are not normally precluded from obtaining their

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[19]The "common carrier" basis for KCC authority shares similar definition problems: what is "public use" as distinguished from "private use?" Kan. Stat. Ann. § 66-105 (1992) ("pipe-line companies . . . operating such agencies for public use in the conveyance of . . . property . . . ."). The answer to this question has a similar all-or-nothing impact.

[20]Kan. Stat. Ann. § 66-105 (1992).

[21]960 P.2d 239 (Kan. 1998).

own supply of heat, light or water for private use.'"[22] Rejecting this argument, the court stated:

> K.S.A. 66-104 does not support the Club's position because the private use exception applies to the first part of the statute (telephone, telegraph, conveyance of oil and gas), but not the second part (heat, light, water, and power) . . . .[23]

This raises the issue of whether activities encompassed by the first part of the statute, relating to "conveyance of . . . gas through pipelines," would be excluded from the second part relating to the arguably broader categories of "companies for the production, transmission, delivery or furnishing of heat, light, water or power." Since gas can be used for "heat" and "power"[24] does the second category subsume the first? The most reasonable interpretation would be that the more specific language in the first part of the statute should override the general language in the second part. The court in the *Water District* case did not have to address this issue because the service at issue was "water."

The two major cases addressing "private use" are *State v. Sinclair Pipe Line Co.*[25] and *State v. City of Coffeyville*.[26] In *Sinclair* the court held that an oil pipeline which was used by its owner solely to transport its own oil to a refinery was not a "public utility" or "common carrier" because there was not a "holding out to the public generally."[27] The owner of the pipeline was buying crude oil in the field, for its own account, and then transporting it to a refinery. Because it did not offer transportation services to any of the producers, it fell within the "private use" exception. In *Coffeyville* the court held that a producer piping gas to the city, and selling it to the city for its own consumption, did not make the seller a public utility or common carrier. The court stated:

> It is a producer of natural gas having one customer only, the City of Coffeyville. It

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[22]Water District No. 1 of Johnson County v. Mission Hills Country Club, 960 P.2d 239, 244 (Kan. 1998).

[23]*Id.* at 245.

[24]In 1911, when K.S.A. § 66-104 was enacted, gas may still have been recognized as a source of "light."

[25]304 P.2d 930 (Kan. 1956).

[26]28 P.2d 1032 (Kan. 1934).

[27]State v. Sinclair Pipe Line Co., 304 P.2d 930, 941 (Kan. 1956).

> is not engaged in general commercial distribution of natural gas, and it does not have a pipe line long enough to bring it within the statutory definition of a public utility.[28]

This case may be of limited authority because the issue was whether the city could authorize entering into a contract to purchase gas by resolution instead of by ordinance. The resolution vs. ordinance issue depended upon whether the contract was with a "public utility;" there was no impacted competitor or consumer asserting jurisdiction.[29]

Subsequent cases have also tended to limit the scope of the *Sinclair* decision. For example, in *Cities Service Gas Company v. State Corporation Commission*[30] the court redefined its holding in *Sinclair* stating: "We held that the state statutes regulating common carriers do not apply to pipelines being used solely in interstate commerce."[31] The court in *Cities* affirmed a KCC order finding that Cities Service became a public utility under K.S.A. § 66-104 when it entered into "direct sales" with gas buyers that would be consuming the gas.[32] The court also introduced a broader "public interest" basis for regulation that focuses on the nature of the activity and the need for regulation to protect the public.[33] In *Cities* it was the gas consumer asking for regulation to protect them from the seller's dictated terms of service. If the "public interest" is not promoted by regulation, and the activity otherwise qualifies as a "private use," a different result could be obtained under the *Cities* analysis. The problem, however, is predicting what the KCC, and the courts, will identify as a "public interest."

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[28]State v. City of Coffeyville, 28 P.2d 1032, 1033 (Kan. 1934).

[29]The court in *Water District No. 1 of Johnson County v. Mission Hills Country Club*, 960 P.2d 239 (Kan. 1998), purported to limit the scope of the *Coffeyville* analysis noting: "*Coffeyville* did not involve a challenge from a public utility that claimed exclusive rights to serve the city." 960 P.2d at 245.

[30]567 P.2d 1343 (Kan. 1977).

[31]Cities Service Gas Co. v. State Corp. Comm'n, 567 P.2d 1343, 1352 (Kan. 1977). Although this statement is not in accord with the facts of what the court actually did in *Sinclair*, it is indicative of the court's desire to limit its *Sinclair* "private use" rationale.

[32]Cities, 567 P.2d at 1353.

[33]Cities, 567 P.2d at 1352.

In *MAPCO Intrastate Pipeline Company v. Kansas Corporation Commission*[34] the court held MAPCO was a "public utility," as well as a "common carrier," even though it did not own any of the pipelines used to conduct the intrastate transportation of natural gas liquids and refined petroleum products. The court found:

> Mapco is a corporation created by its parent to track intrastate movements and to meet tariff requirements for instrastate shipping. It leases pipeline capacity from Mid-America and has no physical assets or employees of its own. As an intrastate carrier, Mapco is regulated by the KCC.[35]

The court concluded MAPCO was a public utility because of its "conveyance of oil and gas through pipelines in or through any part of the state . . . ."[36] The *MAPCO* case is significant because it suggests entities that facilitate transactions can be a "public utility" even though they do not own the assets used to execute the transaction.

The conclusion that can be drawn from these cases is that it is very difficult to predict in advance whether engaging in a particular gas service activity will make one or more of the participants a "public utility." This has a chilling effect on the gas user's ability to engage in self-help activities. Although the user's risk may be minimal or acceptable in many situations, the risk to the transporters, marketers, and suppliers may be such that they are unwilling to assist the gas user in their self-help efforts. Their concern is that a certificate holder in the area will claim the party assisting the gas user is a "public utility" infringing on certificated territory. Although they may have valid defenses against the claim, the cost of making their case before the KCC, and the courts, will often cause them to avoid getting involved. Broad, indefinite definitions, combined with expansive certificated areas and an administrative process designed to protect the status quo, ensure innovation to expand real service in rural Kansas is rarely pursued.

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[34]704 P.2d 989 (Kan. App. 1985).

[35]MAPCO Intrastate Pipeline Co. v. Kansas Corp. Comm'n, 704 P.2d 989, 992 (Kan. App. 1985).

[36]MAPCO, 704 P.2d at 993.

IV. WAYS TO ELIMINATE UNCERTAINTIES AND ADDRESS THE RURAL GAS SERVICE PROBLEM

A. Administrative, Judicial, or Legislative Solution?

In my opinion the only comprehensive way to adequately address the existing constraints on self-help efforts to obtain gas services in rural Kansas is through legislation. Addressing the issues on a case-by-case basis by challenging existing rates, terms of service, and certificated areas would simply be too costly and time consuming. It would also result in at most piecemeal remedies for a state-wide problem. The issues implicate public interests which are best addressed by the Kansas Legislature–the same body that defined the "public utility" in 1911 and, in the same year, created the certificate requirement that has given rise to the certificated area concept. The Legislature can address these issues by creating self-help options that encourage competition to provide gas services to rural Kansans who, to date, have not been actively pursued by those holding the exclusive right to "serve."

B. A Possible Legislative Solution

From our discussions, it appears there are two separate self-help situations you would like to address. The first is where there is a single gas user requiring service; the second is where two or more individuals are seeking service as a nonprofit public utility (NPU).

1. Define "Rural Gas User"

The first step in defining the scope of proposed legislation would be to define the "rural gas user." This definition would account for two major limiting factors: (1) exclusion of areas within the corporate limits of a city; and (2) exclusion of individuals that are already being served by a public utility that has made the investment in distribution lines to connect the customer to its system. The first limiting factor accounts for the "rural" nature of the gas user. If the gas user is within the corporate jurisdiction of a city the compact nature of the service area is such that they do not confront the sort of problems the typical rural customer encounters. The second limiting factor accounts for existing public utilities that have actually invested their capital in infrastructure to directly serve a rural gas user. It is my understanding your goal is to provide service opportunities and options to gas users where the public utility has not spent the money to connect them to their distribution system. The goal would be to include two groups: (1) all persons who currently lack pipeline in the ground to their property; and (2) all persons who have pipeline in the ground to their property but the cost

of the pipeline was paid for by the gas user not the public utility.

The definition of "rural gas user" could provide:

Rural Gas User. Any *person* desiring to use *gas* on property they own, lease, or operate that is located outside *city limits* and not presently receiving gas service from an *existing gas service utility*.

Person. An individual, association, or legal entity.

Gas. Natural gas as the term is commonly understood in the natural gas industry to include the meanings ascribed to the terms "gas" and "natural gas" in Chapter 66 of the Kansas Statutes Annotated.

City Limits. The area within the defined corporate limits of an incorporated city.

Existing Gas Service Utility. A *public utility* that presently owns, operates, maintains, and is responsible for an existing *gas* service line that the *public utility*, or its predecessor in interest, constructed from its distribution system to the point of service physically located on the property being served. In no event will it include a *public utility* that merely owns, operates, maintains, or is responsible for a meter or meter station and incidental connections.

Public Utility. A public utility or common carrier as defined in Chapter 66 of the Kansas Statutes Annotated.

2. Operative Exemption Language

The two basic goals of the proposed legislation would be to eliminate: (1) the obligation to obtain a certificate to provide self-help service to a rural gas user; and (2) the certificated area as a limitation on obtaining or providing service to a rural gas user. The operative language could provide:

Any *rural gas user* who constructs its own pipeline connection to a *gas supply system*, and any *gas provider* assisting the *rural gas user*, shall not be considered a *public utility*. If the *rural gas service* is provided within an area where a *public utility*

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holds a *certificate*, the existence of such *public utility* and its *certificate* will not in any way limit the *rural gas user*, or their *gas provider*, in establishing and maintaining the *rural gas service* provided for by this act.

Gas Supply System. Any well, pipeline, plant tailgate, meter, or other facility which is a source of gas or which is associated with the transportation, treatment, processing, or delivery of gas.

Gas Provider. Any person that provides gas, gas transportation, gas supply management, or other gas services, and any related facilities, associated with delivering gas to a *rural gas user*.

Certificate. Authority granted to a *public utility* to transact business pursuant to Chapter 66 of the Kansas Statutes Annotated, to include any certificated area, territory, or exclusive service rights.

Rural Gas Service. All activities necessary or convenient to procure, manage, transport, and deliver gas to a *rural gas user*.

When there are two or more rural gas users who find it advantageous to combine to obtain rural gas service, the operative language to allow them to operate as a nonprofit public utility would be as follows:

When two or more *rural gas users* combine pursuant to K.S.A. § 66-104c to operate as a nonprofit public utility (NPU), if the *rural gas service* is provided within an area where a *public utility* holds a *certificate*, the existence of such *public utility* and its *certificate* will not in any way limit the *rural gas users*, the NPU, or their *gas provider*, in establishing and maintaining the *rural gas service* provided for by this act.

3. Safety Regulation

During our discussions you indicated we should include a clause expressly addressing compliance with applicable pipeline safety laws. I offer the following language:

All facilities provided for in this act will comply with all applicable pipeline safety laws.

4. Immediate Effective Date

Under the circumstances an immediate effective date would seem appropriate instead of having the law take effect on 1 July 2002.

5. The Combined Proposed Language

The combined language of the proposed law would read as follows:

RURAL KANSAS SELF-HELP GAS ACT

Section 1. Exemption of Rural Gas User from Public Utility Restrictions. Any *rural gas user* who constructs its own pipeline connection to a *gas supply system*, and any *gas provider* assisting the *rural gas user*, shall not be considered a *public utility*. If the *rural gas service* is provided within an area where a *public utility* holds a *certificate*, the existence of such *public utility* and its *certificate* will not in any way limit the *rural gas user*, or their *gas provider*, in establishing and maintaining the *rural gas service* provided for by this act.

Section 2. Exemption of NPU Serving Rural Gas Users from Public Utility Restrictions. When two or more *rural gas users* combine pursuant to K.S.A. § 66-104c to operate as a nonprofit public utility (NPU), if the *rural gas service* is provided within an area where a *public utility* holds a *certificate*, the existence of such *public utility* and its *certificate* will not in any way limit the *rural gas users*, the NPU, or their *gas provider*, in establishing and maintaining the *rural gas service* provided for by this act.

Section 3. Definitions. The following terms will have the indicated meaning:

Certificate. Authority granted to a *public utility* to transact business pursuant to Chapter 66 of the Kansas Statutes Annotated, to include any certificated area, territory, or exclusive service rights.

City Limits. The area within the defined corporate limits of an incorporated city.

Existing Gas Service Utility. A *public utility* that presently owns, operates, maintains, and is responsible for an existing *gas* service line that the *public utility*, or its predecessor in interest, constructed from its distribution system to the point of service physically located on the property being served and which is currently being used to provide the property with *firm gas service*. In no event will it include a *public utility* that merely owns, operates, maintains, or is responsible for a meter or meter station and incidental pipeline connections.

Firm Gas Service. The level of *gas* service which obligates the *public utility* to provide their customer with an unlimited supply of *gas*, available at all times, and delivered to the customer's property without interruption for any reason other than force majeure.

Gas. Natural gas as the term is commonly understood in the natural gas industry to include the meanings ascribed to the terms "gas" and "natural gas" in Chapter 66 of the Kansas Statutes Annotated.

Gas Provider. Any person that provides gas, gas transportation, gas supply management, or other gas services, and any related facilities, associated with delivering gas to a *rural gas user*.

Gas Supply System. Any well, pipeline, plant tailgate, meter, or other facility which is a source of gas or which is associated with the transportation, treatment, processing, or delivery of gas.

Person. An individual, association, or legal entity.

Public Utility. A public utility or common carrier as defined in Chapter 66 of the Kansas Statutes Annotated.

Rural Gas Service. All activities necessary or convenient to procure, manage, transport, and deliver gas to a *rural gas user*.

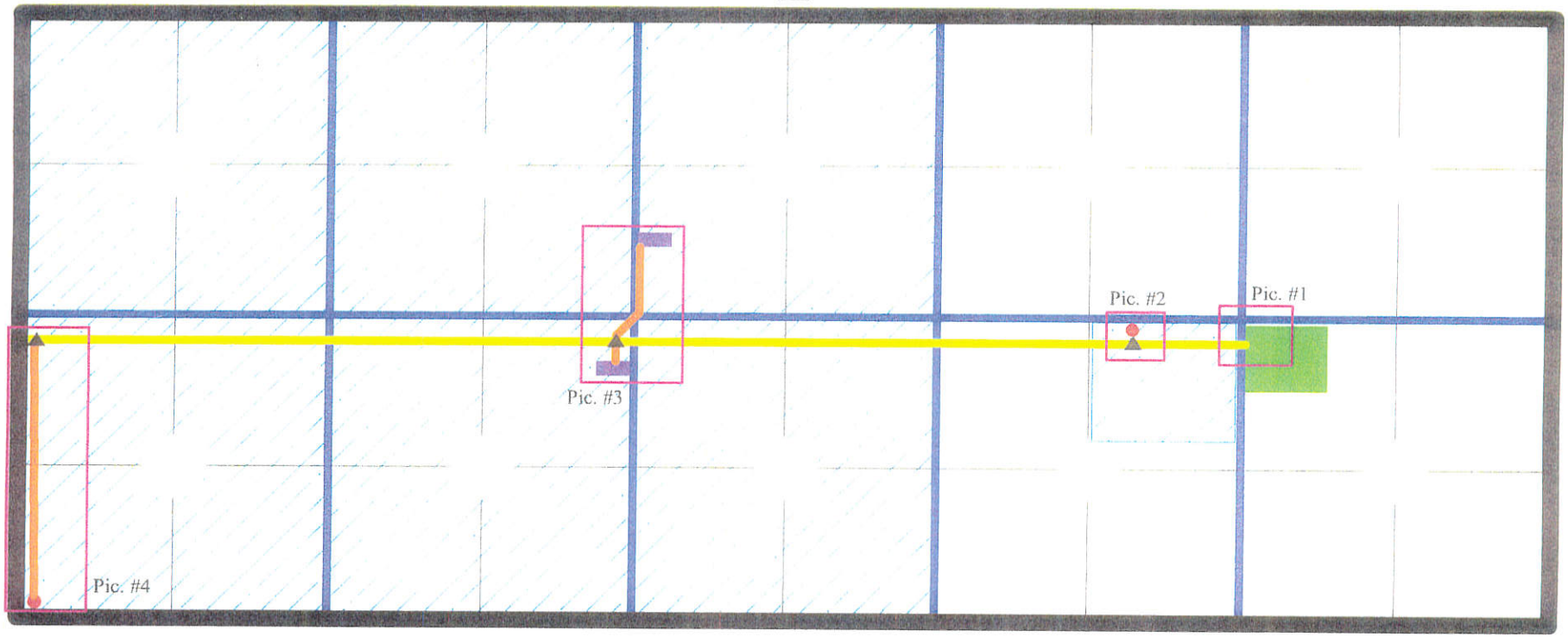
Rural Gas User. Any *person* desiring to use *gas* on property they own, lease, or operate that is located outside *city limits* and not presently receiving gas service from an *existing gas service utility*.

Section 4. Safety. All facilities provided for in this act will comply with all applicable pipeline safety laws.

Section 5. Short Title. This act shall be known as the Rural Kansas Self-Help Gas Act.

Section 6. Effective Date. This act will take effect immediately when passed and signed into law.

Example #1



- Irrigation Motors
- Residential Users
- Utility Meter
- Picture Area
- Gathering Company Lines
- Consumer Lines
- Gathering Company Booster Station
- Utilities Certificated Area

Picture #1

The bottom picture of these two was taken as you turn into the booster station. The top picture was taken at the road crossing just across the road from the booster station. We put these two pictures together to show how we know who owns the natural gas pipeline serving these customers.

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Picture #2

This picture shows an example of a lucky consumer. The consumer's irrigation motor just happens to set next to a natural gas gathering line owned by Duke Energy Field Services. The only thing the utility owns in this case is the meter and small pipefittings to connect the meter to the gathering line. Please note the consumer must pay the Utility for the meter and all fittings to get gas. Even though the utility has very little expense in equipment here they continue to charge the consumer as if they have a complete distribution system in place.

Picture #3

The two pictures shown in this example are two residential consumers tied to the same tap. In the top picture you can see the yellow road crossing sign indicating that the gathering company owns the natural gas pipeline. The consumer in the top picture had to lay roughly 660 feet of pipe to get the gas from the meter to their house. The consumer in the bottom picture had to lay roughly 1'320 feet of pipe to get the gas from their meter to their house. Note the extra equipment at the meter location. This equipment has been installed to keep the gas from freezing off at the expense of the consumer. The utility continues to charge both of these customers as if they have a distribution system in place to serve them. In all reality the consumers have paid for the distribution system and are being taken advantage of by the utility.

Picture #4

This example only shows the meter because it is so far to the irrigation motor in which it serves. From the meter to the irrigation motor it is roughly one half mile. That is roughly 2'640 feet of pipe installed and paid for by the customer. This customer was not as lucky as the customer in picture #2. The customer in this picture is still paying the utility as if they had a distribution system in place. Customer service in rural Kansas does not mean the same as customer service in Wichita Kansas.

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Mr. Chairman

My name is Rex Brown, from Sublette,KS. Thank you for allowing me to give this testimony here today.

I'm the Manager of a family irrigated farm that raises corn, wheat, milo and alfalfa. I'm here today to ask you to support Senate Bill 547.

We are an irrigated farm and have used natural gas as a fuel for our irrigation pumps for 40 years or more. Almost all of our gas has been out of wellheads. Because of the declining pressure in the gas wells it has become extremely difficult to operate our irrigation motors. The local natural gas producers have said there is nothing they can do for us. Helmrich & Payne, Inc. is one of the companies I buy gas from. They sent a letter to us in 2001 that said they were going to stop selling irrigation gas in the near future and that we were going to have to find another source of fuel.

I have just received another notice that they were going to disconnect us on April 1, 2002. In this letter they suggested that Midwest Energy might be able to help us.

After calling Midwest Energy they told me they did not have any gas lines in the area, and that they couldn't help us. No Solution, Sorry.

There is a high-pressure William's gas line very close to most of my ground. The area is certificated by Ulticorp. I have been in contact with them, and they say they need to do a feasibility study on the project before they can do anything. This was a year ago.

The other fuel options are diesel fuel or electricity. This is a very costly conversion and also not economically feasible.

There are companies out there that would serve us if they could get past these certified areas. Why not do away with those certified areas and let competitive business back into the picture? We are asking you to back this bill and eliminate this monopoly these companies have on the gas distribution in Kansas.

Thank You

Senate Utilities Committee
February 20, 2002
Attachment 9-1

TESTIMONY BEFORE THE KANSAS SENATE UTILITIES COMMITTEE IN SUPPORT OF SENATE BILL 547

9:30AM, Wednesday, February 20, 2002

Legislature of the State of Kansas, Senate Utility Committee, Chairman Mr. Stan Clark,

Thank you for allowing me to update you today. I'm here because of the problems that certificated areas for gas utilities are causing on my farm. The area I'm speaking of is Southeast of Sublette in Haskell County and controlled by Peoples Natural Gas. Most of the gas I use is from a third party gathering system, which has declining pressure, and with continued installation of compressors the problem is increasing exponentially.

In 1999, Peoples sent out letters saying that they are not responsible for declining pressure but will continue to serve their customers. My meter on NW/4 of Section 19 30-31 has had zero pressure for the last two years, and I don't know how much longer I'm going to get by.

In 1999 with a group of farmers from the Sublette area, we applied for a not-for-profit utility (NPU) that would serve our needs. We were denied on 11/10/99.

Last year, I received a letter from Hemerich & Payne that they were going to discontinue my well head gas on Hammer #2. A few weeks ago, I received a letter stating that as of April 1, 2002, I will be shut off.

My statement is to show you the problems I face receiving dependable gas service. Gas companies in Kansas with their certificated areas do not have to worry about giving good service because there is no competition.

All I'm asking for is to give me a chance to go out and find someone who will meet my needs as an irrigator.

So please support Senate Bill N. 547.

Thank you,

Chris Hammer

YORK FARMS
HCR 1 BOX 13 B
1163 County Road JJ
SUBLETTE, KANSAS 67877

February 19, 2002

Dear Kansas Senate Committee on Utilities,

My name is Peter York and I represent York Farms which a family farming operation in Haskell County Kansas. We raise corn,wheat, and sunflowers.The majority of our farm is irrigated by thirteen irrigation motors of which twelve use natural gas for fuel. Our labor force consists of myself,my wife,three minor children, and one full time and several seasonal employees. We are tenant farmers for seven families.

Wellhead Natural gas is our fuel source for twelve of our irrigation motors. Due to low gas pressure diesel fuel powers our other irrigation motor.

Helmrich and Payne notified us last year that our well head gas supply to five of our irrigation wells would be discontinued April 1rst of this year. Our three other wellhead gas suppliers have notified us that we could loose adequate gas pressure at any time to our remaining irrigation motors. We have been looking into our energy options for powering our wells since that time. Our current options for powering for these irrigation motors is electricity,gathering line gas, pipeline gas,or diesel fuel. Electricity is cost prohibitive. Gathering line gas is unreliable solution due to declining pressure and contaminants. Diesel fuel is a viable alternative but requires a substantial investment in fuel tanks and motors. Our only current long term option for natural gas in all areas that we farm is though Peoples Natural Gas who is the certificated utility in our area.

I have visited with Peoples representatives on several occasions in the last three years about providing us with natural gas for our irrigation motors. Peoples installed a pipeline adjacent to and

under land that I irrigate with seven irrigation motors. I provided maps showing irrigation motors and current pipelines on land I farm as well as locations of neighbors wells at Peoples request. Peoples was installing a pipeline to two local feedlots and wanted to me to provide information on potential customers. I also worked with one of my landlords in granting easements for this pipeline for little or no cost to Peoples at Peoples request. On three separate occasions over the last three years I have asked about purchasing gas from that same pipeline. Every time I was told by a Peoples representative that in addition to their customary fees they would require me to sign an agreement stating that the ONLY energy source I could use for pumping my irrigation motors was from their Pipeline for the next ten years. I told the Peoples representative (Lynn Walker) that the 10 year clause was the only reason I had not requested service on that pipeline. I asked Peoples if there was any way I could have the ten year clause removed, ~~my~~ his answer was no.

Just in the last week I have found out that other farmers using gas out of this pipeline do not have this same ten year requirement.

This has had a detrimental economic effect on our farm as well as lowering Peoples potential sales of gas. The wellhead gas price was substantially higher than the gas available though Peoples pipeline for several months last year. I neither understand or comprehend how a public utility can service the needs of consumers in this manner.

We need a reliable source of natural gas to power ALL of our irrigation motors very soon. Diesel fuel from the Middle East is more available to us than the natural gas below our feet. Our Certificated Utility has not answered our need in a timely or fair manner. I feel that our solution is Senate Bill No. 547. We need your help.

Thank you for your time and consideration,

Peter York

Peter York

11-2

WILFERD NICHOLS
431 TT RD
COPELAND, KS. 67837

SENATE UTILITIES COMMITTEE
STAN CLARK (CHAIRMAN)
TOPEKA, KS.

DEAR COMMITTEE;

MY NAME IS WILFERD NICHOLS I HAVE AN IRRIGATED FARM IN NORTHEAST HASKELL COUNTY. I SERVE AS A DIRECTOR FOR THE SOUTHWEST CORN GROWERS AND THE KANSAS CORN GROWERS ASSOCIATION; I AM A MEMBER OF THE KANSAS WHEAT GROWERS ASSOCIATION AND THE KANSAS LIVESTOCK ASSOCIATION. THANK YOU FOR THE OPPORTUNITY TO SHARE MY SITUATION WITH YOU.

ONE FARM THAT I OPERATE HAS A WELLHEAD TAP FOR NATURAL GAS FOR IRRIGATION AND FREE GAS FOR MY FARMSTEAD. AFTER A PERIOD OF DECLINING GAS PRODUCTION MY GAS WELL WAS RECLASSIFIED AS A STRIPPER WELL. GAS PRICES IN THE EARLY 1980S WERE LESS THAN 1 DOLLAR AND ESCALATED TO $5.72 BY JUNE OF 1989.

THIS PARTICULAR PROPERTY LIES WITHIN THE KANSAS NEBRASKA CERTIFICATED AREA. THE CLOSEST KN DISTRIBUTION LINE WAS 1 1/4 MILES FROM MY PROPERTY, BUT DID NOT HAVE THE CAPACITY TO HANDLE ANY MORE CUSTOMERS. KN REFUSED ME SERVICE.

I ASKED KN FOR A RELEASE FROM THE CERFIFICATED AREA TO PURSUE A GAS CONTRACT FROM COLORADO INTERSTATE GAS COMPANY, WHICH WAS THE GATHERING LINE FROM MY GAS WELL. KN TOLD ME THAT IF I COULD ACQUIRE TAP AND GAS CONTRACTS THEY WOULD RELEASE ME. I WAS ABLE TO GET WRITTEN CONTRACTS FOR IRRIGATION TAP AND METER SETTING FROM CIG AND A WRITTEN AGREEMENT FOR GAS SERVICE FROM COASTAL GAS MARKETING COMPANY.

KANSAS NEBRASKA THEN REFUSED RELEASE AND REFUSED GAS SERVICE FROM THEIR GAS LINE.

I PLEADED MY CASE TO THE KANSAS CORPORATION COMMISSION; THE COMMISSION CONSIDERED THIS A "BY PASS" AND REFUSED INVOLVEMENT.

SUBSEQUENTLY KANSAS NEBRASKA CHANGED THEIR INFRASTRUCTURE FOR ADDED VOLUME AND OFFERED SERVICE BUT REFUSED TO LAY DISTRIBUTION LINE TO MY PROPERTY. THE COST OF THIS LINE WAS OVER $10,000, ALL MY EXPENSE.

If Kansas Nebraska would have released me from their certificated area I would have had to lay only 50 ft. of line to be connected to CIG gathering system. Gas prices from Coastal Gas Marketing were less than 1/2 of what I was forced to pay for stripper gas.

I have to pay $.53 transportation charge to put gas though my line. Is there anyone here today who would like to haul my corn to market and pay me to do so?

Utility gas companies in these certificated areas have the ability to hold agriculture producer's hostage and rob them, with the approval and blessing of the Kansas Corporation Commission.

Sincerely Your:

Wilferd Nichols

12-2

Testimony to the
Senate Committee on
Utilities
Regarding Senate Bill No. 547
By
Bill Lower, Haskell Co. Commissioner
Kansas Legislative Policy Group
February 20, 2002

Mister Chairman, Members of the committee,

I appear before you today in support of Senate Bill #547. The number one industry in southwest Kansas is agriculture. It is the backbone of our economy! We are blessed to have good soil and a supply of water we judiciously use for the purposes of raising farm commodities.

I serve as an elected member of the Haskell County Commission. Not only do I represent myself here today; a third generation farmer, but I represent every farmer in Haskell County and speak in behalf of the 35 western Kansas Counties that belong to Kansas Legislative Policy Group.

For many, many years we have relied on natural gas from the Hugoton field at the well head. With the gas supply decline in the Hugoton field, so goes the pressure. Without adequate pressure we cannot operate an irrigation engine. Many farmers already have received notices that their gas contracts will be terminated for this year. We have a lifetime of investment in these irrigation operations. We must have access to another source of affordable natural gas if these companies with certificated areas are not going to supply farmers with natural gas. Simply put, this proposed legislation would permit a rural gas user (RGU) or non-profit utility (NPU) to construct a

pipline connection to a gas supply system and would not be considered a public utility. The NPU, if it is in an area where an existing public utility holds a certificate for the service area, shall not be limited in establishing or mantaining rural gas service.

Please remember this proposed legislation is about the backbone of the economy of rural Kansas. The economies of our towns and cities in western Kansas are dependent on agriculture. I urge the Senate Committee on Utilities to approve Senate Bill No. 547.

I appreciate being given the opportunity to address the Committee and am pleased to address any questions.

Thank you.
Bill Lower,
Haskell Co. Commissioner

TESTIMONY BEFORE THE KANSAS SENATE UTILITIES COMMITTEE
IN SUPPORT OF SENATE BILL 547

9:30 a.m., Wednesday, February 20, 2002

Legislature of the State of Kansas, Senate Utility Committee, Chairman Mr. Stan Clark:

I am writing in regards to Senate Bill 547. My name is Roger Kelman. I live near Sublette in rural Haskell County. My family and I own and operate an irrigated grain farm.

Natural gas is the fuel of choice for irrigated farms and the gas pressures in the Hugoton Field are rapidly declining. As the pressures drop, the reliable source of irrigation fuel we've been used to is gone.

The only options I have are to convert to diesel fuel or to buy gas from Peoples Natural Gas. Peoples holds the certificated area around my farm. Peoples has notified me that they cannot assure us of enough pressure to operate irrigation wells. If we want their gas, we need to buy a compressor to get enough gas to irrigate.

My other option is to convert to diesel engines. This is very costly to do. New engines require different gear heads, tanks, etc. In addition, diesel has to be delivered weekly while natural gas is constantly supplied.

Please pass Senate Bill 547 which will allow farmers to construct their own pipelines for irrigation use along with a reliable source of gas to heat our homes.

Sincerely,

Roger Kelman

STATEMENT OF THE

SOUTHWEST KANSAS GROUNDWATER MANAGEMENT DISTRICT

TO THE SENATE UTILITIES COMMITTEE

SENATOR STAN CLARK, CHAIR

REGARDING S.B. 547

FEBRUARY 20, 2002

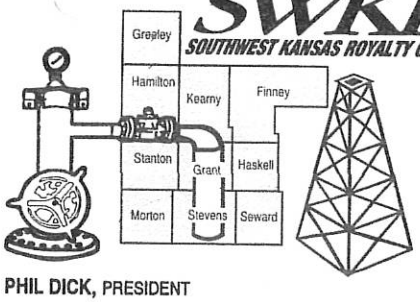
Mr. Chairman and Members of the Committee, I am Chris Wilson, Legislative Liaison for the Southwest Kansas Groundwater Management District (GMD 3), headquartered in Garden City. GMD 3 supports S.B. 547, which would allow rural gas users to construct their own pipeline connection to a gas supply system, without being considered a public utility. This legislation is needed in order to allow small rural fuel users who are not being served to access the fuel. Infrastructure is available to serve these individuals and could be utilized if this bill passes.

This legislation is of importance and concern to the constituents of GMD 3 and the economy of Southwest Kansas. The fuel is needed to continue to produce the crops that are so vital to this economy and to the tremendous production of meat and milk in our District.

Thank you for the opportunity to offer our support for S.B. 547.

####

SWKROA
SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION



E-mail: SWKROA@pld.com
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209 E. 6th St. / P.O. Box 250
Hugoton, Kansas 67951

PHIL DICK, PRESIDENT
ERICK NORDLING, EXECUTIVE SECRETARY
B.E. NORDLING, ASS'T. SECRETARY

Statement of
Erick E. Nordling, Executive Secretary
Southwest Kansas Royalty Owners Association
Hugoton, Kansas

February 20, 2002

To the Honorable Members of the Senate Utilities Committee:

Re: Senate Bill 547 relating to the rural Kansas self-help gas act.

Chairman Clark and Members of the Committee:

My name is Erick E. Nordling of Hugoton. I am Executive Secretary of the Southwest Kansas Royalty Owners Association (SWKROA). I am writing on behalf of members of our Association and on behalf of Kansas royalty owners to express our support of Senate Bill 547 and creation of the rural Kansas self-help gas act in the State of Kansas.

As pressures in the Hugoton Gas Field continue to decline and lesser quality gas is produced, gas providers are trying to reduce, if not eliminating entirely, services provided by well-head taps, primarily affecting irrigation farming in southwest Kansas. Passage of Senate Bill No. 547 would permit a rural gas user (RGU) or a non-profit public utility (NPU) to provide a valuable service to these agricultural interests in our communities. We believe this legislation will aid the Hugoton Field by providing an additional, although marginal, market and thus it would be in the interests of our members. In its broader aspects, passage of Senate Bill No. 547 can contribute to the general economic well-being of the southwest corner of the state and is worthy of our support on that basis.

Thank you for this opportunity to present our support of Senate Bill No. 547 to your honorable committee.

Respectfully submitted,

Erick E. Nordling
Executive Secretary, SWKROA

Senate Utilities Committee
February 20, 2002
Attachment 16-1

Kansas Farm Bureau
2627 KFB Plaza, Manhattan, Kansas 66503-8508 • 785.587.6000 • Fax 785.587.6914 • www.kfb.org
800 S.W. Jackson, Suite 817, Topeka, Kansas 66612 • 785.234.4535 • Fax 785.234.0278

PUBLIC POLICY STATEMENT

SENATE COMMITTEE ON UTILITIES

RE: SB 547 – establishing the rural Kansas self-help gas act.

February 20, 2002
Topeka, Kansas

Presented by:
Leslie Kaufman, Associate Director
Public Policy Division

Chairman Clark and members of the Senate Utilities Committee, thank you for the opportunity to present testimony supporting the concept of increasing opportunities for rural Kansans to access dependable natural gas supplies. I am Leslie Kaufman and I serve Kansas Farm Bureau as the Associate Director of Public Policy.

The ability to access dependable, affordable natural gas for agricultural and residential use is a significant concern for many of our members and working to address these issues is nothing new for our organization. For many, especially in the southwest area of the state, the inability to secure dependable service, at a reasonable cost or through reasonable investment, is nearly impossible. As such, our members have enacted policy regarding natural gas and certain policy provisions that are relative to the bill before you, SB 547 are as follows:

- We support national and state legislative or regulatory commission action to prolong the life of existing gas fields, insure access to and provide a dependable, timely, uninterrupted supply of affordable natural gas for irrigation, other agricultural purposes and rural residences; and

- We support existing law which provides agriculture producers the opportunity to create non-profit utilities.

SB 547 provides one approach for increasing access opportunities for rural Kansans, particularly agriculture producers, to acquire dependable gas supplies. We respectfully encourage the Committee to act favorably on concepts that advance this policy goal. Thank you.

Kansas Farm Bureau represents grassroots agriculture. Established in 1919, this non-profit advocacy organization supports farm families who earn their living in a changing industry.

Kansas Corn Growers Association

TESTIMONY

TO: Senate Committee on Utilities

FROM: Jere White, Executive Director

DATE: February 20, 2002

SUBJECT: SB-547

The members of the Kansas Corn Growers Association wish to submit this testimony in support of SB-547. This bill is concerned with allowing rural residents the opportunity to secure reliable supplies of natural gas. Many of our members who reside directly above some of the largest natural gas deposits in the world find themselves with a greater challenge in procurement of that gas, than residents located hundreds or even thousands of miles away. The irony is not lost on them, but unfortunately, irony won't heat the home or run an irrigation pump.

SB-547 gives opportunity for Kansas residents to seek alternatives, when their needs are not being provided for. It isn't about price. It isn't even about forcing a service to be given. It is merely about allowing those that are not otherwise being adequately served to find service elsewhere. Entities that wont provide adequate services should not hinder service from others.

Many might think that this issue only resides in Western Kansas. We believe the ramifications are indeed statewide. There has been a lot of recent activity in natural gas leasing and drilling in Eastern Kansas. While the results are yet to be finalized, the kinds of future issues possible to rural citizens in the East will likely seem like a case of déjà vu to our friends in the West. With SB-547, this committee has the opportunity to provide all citizens with reasonable options for correcting and even preventing problems.

Kansas has experienced similar growing pains in providing opportunities for its rural citizens. Rural electrification was certainly a daunting task. The game plan had to be adjusted from time to time. With natural gas service, the existing restrictions of certification are no different. A needed adjustment can be found in SB-547. We urge this committee to pass this bill favorably. Thank you.

Senate Utilities Committee
February 20, 2002
Attachment 18-1

P.O. BOX 446, GARNETT, KS 66032-0446 • PHONE (785) 448-6922 • FAX: (785) 448-6932
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Midwest Energy, Inc.
SENATE BILL No. 547 Testimony
Presented by Larry Berg
AN ACT Establishing the Rural Kansas Self-Help Gas Act
Senate Utilities Committee
February 20, 2002

Midwest Energy, Inc., a member-owned cooperative providing electric and natural gas energy and services in parts of 40 rural counties in central and western Kansas, opposes the proposed Bill as currently drafted.

While the impetus for development of such an Act is based on providing certain customers, who may feel they are currently "under-served", with the ability to help themselves to obtain natural gas service, the consequences are likely to be detrimental to the long-term provision of natural gas service in rural areas, and to the public interest in general.

Midwest Energy, Inc. would offer the following comments in support of its opposition:

- In southwestern Kansas there are significant numbers of natural gas customers currently served either directly from a natural gas wellhead, or from a natural gas gathering system. Neither of these providers is classified as a public utility in Kansas. As the producing capabilities of the Hugoton gas field continue to decline, many customers currently served from either the wellhead or gathering systems are being forced to look elsewhere for supply.
- Midwest Energy, Inc. has made significant investments ($4,000,000 +) since 1998 in this area to build new gas distribution systems to serve these rural (predominantly irrigation) customers that were forced to seek new natural gas sources of supply. (During that time, approximately 700 irrigation wells were connected to our system.) In some cases the customer has financed a portion of the construction; in other cases Midwest has borne the risk of attracting and retaining customers. In either case, these decisions were made by the customers and Midwest based upon expectations of obtaining and retaining additional load in the future. The ability to attract new customers plays a significant role in our ability to keep our operating costs low.
- Our purchase of the KN Energy distribution properties in 1998 was based in part on our commitment to undertake these types of expansion projects. Numerous customers, and even several state legislators, supported our acquisition efforts with the Kansas Corporation Commission and the Governor's office, and indeed the Commission ultimately approved the acquisition based in part on our commitment to the region.
- While gas producers and gathering companies are forcing customers to seek gas supplies elsewhere, public utilities like Midwest Energy, Inc. are "stepping up to the plate" to build the infrastructure to ensure adequate supplies to these rural customers.
- The track records of some independent, unregulated "gas providers" in assisting a rural gas user to build their own system are less than credible. One need only look as far as Nebraska to find significant problems in the safe construction and operation of unregulated NPU-type facilities, built by gas suppliers, as suggested in this Bill.

- If certain regulated public utilities in Kansas are not willing or able to work with certain gas customers in their certificated territory to construct new facilities, there are other public utilities that are willing to do so. These options should be explored.
- To open up the construction of new unregulated gas delivery systems on a large scale not only hurts the economics of existing public utilities who take their obligation to serve seriously, it also will hurt the customers in the long run as well. This is particularly true of a member-owned utility like Midwest Energy, Inc. Furthermore, there may well be significant safety problems that will arise with the rapid expansion of the proposed private utilities (regardless of their not-for-profit status). This is obviously not in the public interest.

We would suggest to the Committee on Utilities that it investigate the circumstances surrounding the introduction of the legislation proposed in Senate Bill No. 547 and what alternatives are available from the regulated public utilities. Such an investigation should include testimony from the public utilities holding certificates to serve in Kansas where they could address further the issues raised above and discuss possible solutions.

NUCLEAR WASTE

Bush OKs Yucca Mountain storage

By H. Josef Hebert
The Associated Press

WASHINGTON — President Bush approved Nevada's Yucca Mountain on Friday as the site for long-term disposal of thousands of tons of highly radioactive nuclear waste.

In a letter to congressional leaders, Bush said a central disposal site for as much as 77,000 tons of waste that is building up at sites across the country "is necessary to protect public safety, health and this nation's security."

He noted that Nevada was expected to file a protest that will leave the final decision on whether to proceed up to Congress.

Nevada officials have argued that the government can't ensure the public will be protected over the thousands of years the waste will remain dangerous. The site is 90 miles northwest of Las Vegas, one of the fastest growing urban areas in the country.

Sen. Harry Reid, D-Nev., accused Bush of breaking a campaign promise in which to told Nevadans he would base a decision on Yucca Mountain on "sound science not politics."

"Today President Bush broke this promise," said Reid.

Bush said his decision "is the culmination of two decades of intense scientific scrutiny" and that he is certain the science is sound. The plan calls for putting the waste, mostly used reactor fuel rods from commercial power plants, into volcanic rock 950 feet below the desert surface.

Nevada's Republican governor, Kenny Guinn, said he was outraged. Within hours, Nevada filed suit in federal court arguing the way the Energy Department came to its conclusions in recommending the site violated a 1982 nuclear waste law. The suit had been expected.

Bush followed the recommendation of Energy Secretary Spencer Abraham who in a telephone call with reporters said, "It is my strong belief the science supports the safe use of this repository."

"We feel strongly this make sense to the nation," said Abraham, noting that Yucca Mountain would provide a place not only for commercial waste but also used nuclear fuel from the Navy and high-level waste from nuclear weapons sites.

House Speaker Dennis Hastert, R-Ill., whose state has 11 commercial power reactors, said the Yucca Mountain facility "should be completed without further delay." He said he is certain the site "is safe, secure and viable."

But House Democratic leader Dick Gephardt of Missouri, expressed concern about the thousands of waste shipments that will have to crisscross the country. With most nuclear power plants in the eastern third of the country, many of those shipment move through Missouri.

Abraham said the waste can be transported safely, and "it poses a greater risks to the communities where it is" now kept since many of the power plants are near urban areas.

Congress will have to decide, by majority vote of both houses, whether to uphold the decision or side with Nevada and find another site for the more than 40,000 tons of waste now kept at commercial reactors in 34 states as well as waste kept at defense sites.

The president's action marks a major step in the decades-long dispute over what to do with the waste generated by commercial nuclear power plants and by the government nuclear weapons program. The waste at commercial reactors is growing by 2,000 tons a year.

Unless Congress sides with Nevada, the Energy Department's next step will be to get a license for the Yucca facility from the Nuclear Regulatory Commission, a process that could take several years. No waste is expected to be shipped to the site before 2010 and even that target is likely to slip.

Abraham recommended a green light be given to the Yucca project in a letter to the president late Thursday. He said a review of 20 years of scientific studies had convinced him the waste could be kept at the site without risk.

Reid called the choice to go ahead with the project "a hasty, poor and indefensible decision" at a time when "the science does not yet exist" to ensure the waste can be contained.

Under a 1987 law, which limited the scientific studies on a possible site to Yucca Mountain, Nevada can file an objection and stop the project. But Congress, in turn, can override the objection.